19 No. (1) 08-1045 DEC 19 2008

In The
Supreme Court of the United States

CAROLYN YVONNE MURPHY TAYLOR

Petitioner,

v.

Walter Todd, Esq., in his official capacity as Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity; Hunter P. Swanson, Esq. in her official capacity as Assistant City Attorney and her individual capacity,

Respondents,

and

City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity,

Defendants.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth District

PETITION FOR WRIT OF CERTIORARI

CAROLYN YVONNE MURPHY TAYLOR
Petitioner, *Pro Se*
2295 Byrnes Drive
Columbia, South Carolina 29204
(803) 771-6297 or (803) 309-0487

QUESTIONS PRESENTED

1. Whether Municipal prosecutors not acting within the scope of their official duties in the judicial phase of a case under the International Property Maintenance Code Ordinance are entitled to absolute immunity in their individual capacities for liability under 42 U.S.C. 1983?

2. Whether Municipal prosecutors in the judicial phase of a case under the International Property Maintenance Code Ordinance are entitled to absolute immunity in their individual capacities for liability under 42 U.S.C. 1983 when the code enforcement officer violated of the Petitioner's constitutional right to a mandated notice of violation before the case began?

3. Whether Municipal prosecutors can be dismissed from a case in their official capacities pursuant to Rule 12(6) under a theory of redundancy?

4. Whether Municipal prosecutors in the judicial phase of a case under the International Property Maintenance Code Ordinance not being entitled to absolute immunity in their individual capacities for liability under 42 U.S.C. 1983 is a novel issue of law?

PARTIES

The caption of the case includes all parties to the proceedings in:

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT
No. 08-1372

and

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
C/A No. 3:07-983-JFA-JRM.

CORPORATE DISCLOSURE STATEMENT

I, Carolyn Yvonne Murphy Taylor, am the *Pro se* Petitioner. I am not a publicly held corporation or publicly held entity. There is no parent or publicly held company owing 10% or more of a corporation's stock affiliated with me.

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42 U.S.C. § 1983

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carolyn Yvonne Murphy Taylor respectively petitions this Court to issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth District filed August 25, 2008 and unpublished

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

The opinion of the United States Court of Appeals for the Fourth Circuit in Carolyn Yvonne Murphy Taylor v Todd, et. al was filed on August 25, 2008 and is unpublished. (App. at 1) The petitioner sought a rehearing En Banc which was filed September 8, 2008. (App. at 80) The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on September 22, 2008, and is unpublished. (App. at 3)

The opinion of the U.S. District Judge adopting the U.S. Magistrate Judge's Recommendation to grant absolute immunity to the Municipal prosecutors in their individual capacities and rejecting the U.S. Magistrate Judge's Recommendation not to dismiss the Municipal prosecutors in their official capacities was filed February 29, 2008. (App. at 4) The underlying decisions of the U.S. Magistrate Judge's Report and Recommendation were filed February 7, 2008. (App. at 8)

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees procedural rights and substantive rights. The Equal Protection Clause of the Fourteenth Amendment to the

United States Constitution guarantees that all persons in a class be treated alike.

The 14th Amendment Section 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where-in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUES AND REGULATIONS INVOLVED

The 2000 International Property Maintenance Code (IPMC) is an ordinance adopted by the City of Columbia in September 2001. (Rec. Doc. 1-2, p. 45 of 139) The IPMC has a mandated notice of violation requirement. The notice of violation can only be issued by a code enforcement officer. The notice of violation is the law of the case. The notice of violation is the element of proof necessary to obtain a conviction for violating the IPMC. The expressed intent of the IPMC is to govern existing buildings and structures. (App. at 13-15)

STATEMENT OF THE CASE

Taylor was served with a Notice of Violation ("Notice") dated December 9, 2004, citing violations of City ordinances 8-31 through 8-35 and 8-301 through 8-304. The Notice cited no violations of the International Property Maintenance Code (IPMC). (App. at 18-19) Taylor had previously been informed by City Code Enforcement Officers to maintain items stored in her yard a minimum of 18 inches off the ground and to keep them covered. (Rec. Doc.18, ¶ 15)

On March 11, 2005, Taylor was served with Uniformed Ordinance Summons No. 7580 for violation of the International Property Maintenance Code. The charge was for violation of Ordinance Section No. 2000-027 of the Municipal Code of Laws for the City of Columbia, unlawful acts, first offense. (App. at 20) Taylor was told at that time all items in her yard should have been removed. She had received no prior notice of the alleged code violation, in contradiction of requirements of the IPMC. (Rec. Doc.18, ¶ 15)

On March 16, 2005, Taylor received a copy by mail, of page 9 from the 2003 IPMC, along with the cover, indicating she was in violation of section 302.1. (Rec. Doc.18, ¶ 18) That section requires an occupant to maintain all exterior property and premises in a clean, safe and sanitary condition. (Rec. Doc.1-2, p. 5 of 139 §302.1) The following day, she received a copy of the Ordinance Bonds (City Charge Codes) in the mail. It showed a different charge code for the violation of the IPMC and violations in the Warning Notice of Violation pursuant to Code 8-31, et al Taylor received. (Rec. Doc.18, ¶ 20)

Taylor paid a $153.75 bond and requested a jury trial on April 11, 2005. She also conferred with McCall, a supervisor of inspectors that day. She was allowed to read the 2003 IPMC and its Commentary. Contrary to earlier representations made to Taylor, Section 104.6 requires prior notice of a code violation for the specific purpose of allowing an accused to take corrective action. Section 107.2 mandates the specific requirements to be included in the notice. Taylor informed McCall of the misrepresentations, but no corrective action was taken. (Rec. Doc.18, ¶ 22-23)

Thereafter, Taylor appeared at court on ten (10) different occasions for the trial by jury she had requested. Several different prosecutors appeared on behalf of the City of Columbia during this period. Prior to the trial date of

September 23, 2005, Taylor called the code enforcement officer to inspect her yard. Satisfied that Taylor had cleaned her yard, he asked to inspect the area behind her privacy fence. This was the first time such a request had been made. Upon Taylor's refusal, the inspector called McCall, who also asked to inspect the area behind her privacy fence. Taylor refused. (Rec. Doc. 18, ¶ 32)

At the trial on January 13, 2006, Thye moved for an Order to compel Taylor to allow Inspector(s) to inspect behind her privacy fence in her backyard by misrepresenting to the court that section 104.2 still gave the City a "right of entry". Taylor objected on grounds of unfair surprise and that she had been noticed solely for a jury trial on the issue of whether she was in violation of the IPMC on March 11, 2005. Taylor objected to Thye's motion, but it was granted. The trial was continued to allow the inspection of the area behind Taylor's privacy fence. (App. at 92-105)

At the trial on March 10, 2006, Taylor motioned the court to dismiss the case for a failure to comply with the notice provisions of the IPMC. The motion was denied. Taylor also motioned for a continuance, which was granted. (Rec. Doc. 18, ¶ 42)

On May 1, 2006 Thye submitted a Proposed Order denying Taylor's Motion to Dismiss to Judge Hanna. (App. at 110-113) On May 3, 2006 objections were sent to Judge Hanna the Order contained numerous errors of law and facts and requested that the misrepresentations be corrected. (App. at 114-117) On May 8, 2006, Thye submitted another Proposed Order to Judge Hanna purporting that there was only one error. The year should be 2000 instead of 2003. (App. at 118) The Judge never signed and filed the changed proposed Order denying the Motion to Dismiss. (Rec. Doc. 18, ¶ 55)

At the trial on November 30, 2006, Swanson appeared as substitute counsel for Thye. The case was nol prossed because the inspector no longer worked for the City. However, prior to the trial date, Taylor filed a Motion to Dismiss (App. at 123-129) which the Judge refused to hear and rule on, and told Taylor she could bring that issue up when she was issued another summons for her yard. (App. at 119-122)

For over 1 ½ years, Taylor was harassed to clean her yard of her personal property and was deprived of her liberty and property by the Defendant Assistant City Attorneys, even though the IPMC did not give them the authority. Additionally, to add insult to her injury, the notice of violation Taylor received deprived her of her Constitutional rights to due process of the law and equal protection.

Suit was filed in this case on multiple grounds, including violations of procedural and substantive due process, equal protection, refusing or neglecting to prevent, conspiracy, intentional infliction of emotional distress, and malicious prosecution. (Rec. Doc. 1 and Doc. 18)

Prior to answering the Amended Complaint, the Defendants Todd, Thye, and Swanson filed a Motion to Dismiss pursuant to federal Rule of Civil Procedure 12 (6). (Rec. Doc. 21)

Jurisdiction of the District court arises under 28 U.S.C. sections 1131, 1343(a), and 1367; 42 U.S.C. sections 1983 and 1985.

Jurisdiction of the District Court for the pendent claims is authorized by F.R.Civ.P. 18(a), and arises under the doctrine of pendent jurisdiction.

REASONS FOR GRANTING THE WRIT

I. THE MUNICIPAL PROSECUTORS WERE NOT ACTING WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES IN THE JUDICIAL PHASE OF A CASE UNDER THE INTERNATIONAL PROPERTY MAINTENANCE CODE AND ARE NOT ENTITLED TO ABSOLUTE IMMUNITY IN THEIR INDIVIDUAL CAPACITIES FOR LIABILITY UNDER 42 U.S.C 1983.

The provisions of the 2000 International Property Maintenance Code (IPMC) ordinance, which was adopted by the City of Columbia in September 2001, (Rec. Doc. 1-2, p. 45 of 139) prescribing the manner of administration must be strictly pursued. The requirements for the prosecution for violations of the 2000 IPMC are set forth in Section106. 3. (App. at 14)

Petitioner was charged with violating the IPMC on March 11, 2005. (App. at 20) Section 106.3 of the IPMC is the only authority for prosecuting the Petitioner for a violation of the 2000 IPMC. The prosecutors, as well as the Courts, only need to comply with the directives as written. The language of the IPMC for violations is very clear and unambiguous, and is mandatory as opposed to being discretionary. (App. at 14)

In order to obtain a conviction for <u>any</u> violation of the IPMC, a prosecutor must prove the following elements beyond a reasonable doubt: (1) The defendant received the mandated notice of violation as required in section 107; and (2) the defendant did not comply with the correction order to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of the IPMC. (App. at 14, §106.3)

Strict compliance of Section 107.2 is mandatory for the code enforcement officer and a notice of violation shall be in accordance with all of the following:

1. Be in writing.
2. Include a description of the real estate sufficient for identification.
3. Include a statement of the violation or violations and why the notice is being issued.
4. Include a correction order allowing a reasonable time to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of this code.
5. Inform the property owner of the right to appeal

(App. at 15, §107.2)

There is a legal presumption of a proper notice of violation for the IPMC when Section 107.2 is followed. The notice of violation serves at least four purposes: (1) It assures the defendant of reasonable notice of the alleged violations; (2) It allows a defendant a reasonable time to take corrective actions to bring the dwelling unit or structure into compliance with the IPMC; (3) It informs the property owner of the right to appeal; and (4) It protects the constitutional rights of a defendant to due process and equal protection of the law under the 14th Amendment, especially for strict liability offenses.

This is a rare case of where the prosecutors' actions in the judicial phase of a prosecution are clearly not within the scope of their official duties under the IPMC and is well documented in the record. The Court of Appeals, the District Court and the Magistrate's Report and Recommendation conclusions are in error by granting

absolute immunity to the Respondents in their individual capacities under Imbler v. Patchman, 424 U.S. 409 (1976), and they seriously affect the fairness, integrity and public reputation of judicial proceedings.

In order to sustain a conviction for any violation of the IPMC, the prosecutor must have a mandated notice of violation from which the jury can find beyond a reasonable doubt that the defendant did not comply with the correction order to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of the IPMC. (App. at 14, §106.3)

The plain requirements of Section 107.2 for the notice of violation to Petitioner are not evidenced in the Warning Notice of Violation issued by the Code enforcement Officer on December 9, 2004). (App. at 18-19) The Warning Notice of Violation is invalid on its face. It violates the Petition's constitutional right to due process of the law under the 14th Amendment to the U.S. Constitution because that notice: (1) does not inform the Petitioner of the Sections of the IPMC being violated and why the notice is being issued; (2) does not include a correction order allowing a reasonable time for Petitioner to make repairs and improvements required to bring her dwelling unit or structure into compliance with provisions of the IPMC; and (3) does not inform Petitioner of the right to appeal. A Warning Notice of Violation that does not comport with section 107.2 is constitutionally infirm.

The Report and Recommendation relied heavily on Imbler to conclude the Defendants were entitled to absolute immunity because their actions were conducted in the court room during the judicial process. (App. at 9-11) Thye's obtaining an Order to look in Petitioner's backyard behind her privacy fence was considered a part of the judicial process under the IPMC. (App at 92-106) Swanson nolle prossed the case for lack of the code enforcement officer,

the witness, who could have testified about the yard even though there was a Motion to Dismiss on a question of law about the adequacy of the Warning Notice of Violation. An issue of law takes precedent over an issue of fact. (App. at 119-129)

The key words in the mandated notice of violation are dwelling unit and structure. The IPMC defines a dwelling unit as: "A single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation."; and defines a structure as: "That which is built or constructed or a portion thereof." (App. at 16) The Municipal prosecutors emphasized the Petitioner's items stored in her yard as a violation of the IPMC §302.1. (App. at 112) A yard is not a dwelling unit or structure. A yard is open space on the same lot with a structure. (App. at 17) Therefore, they were not acting within the scope of duties of the IPMC.

Imbler was the first case by this Court to address liability for 42 U.C. 1983 of a state prosecuting officer. The Court held: A state prosecuting attorney who, as here, acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune from a civil suit for damages under 1983 for alleged deprivation of the accused's constitutional rights. At 417-43.

A Warning Notice of Violation that does not comport with section 107.2 is constitutionally infirm. The granting of absolute immunity to Municipal prosecutors who were never acting within the scope of duties of the IPMC with a proper notice of violation is contrary to granting absolute immunity to the state prosecutor in Imbler who was acting within the scope of his duties in initiating, pursuing and presenting the State's case.

As discussed above, the Municipal prosecutors were not acting within the scope of their official duties of the IPMC and the Court of Appeals erred in affirming the District Court's Order. This Court should issue a Writ of Certiorari.

II. THE CODE ENFORCEMENT OFFICER VIOLATED THE CONSTITUTIONAL RIGHT TO THE MANDATED NOTICE OF VIOLATION BEFORE THE CASE BEGAN AND THE MUNICIPAL PROSECUTORS IN THE JUDICIAL PHASE OF A CASE UNDER THE INTERNATIONAL PROPERTY MAINTENANCE CODE ARE ENTITLED TO ONLY QUALIFIED IMMUNITY.

At the January 11, 2008 hearing on the Motion to Dismiss, the Petitioner argued that the prosecutors were not entitled to absolute immunity in their individual capacities according to the standard, "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity.", used by this Honorable Court in Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (Rec. Doc. 54 pp. 31-32) A supplemental Memorandum was filed on January 22, 2008. (App. at 51)

The Report and Recommendation rejected this Court's standard stating that: "In her supplemental memorandum, Taylor argues that absolute immunity should not apply to the defendants because the alleged constitutional violation occurred prior to the beginning of the judicial portion of the case. In this regard, Taylor argues that the constitutional violation occurred when the Code Enforcement Officer, Donnie Balziegler, failed to give her the proper notice required by the IPMC before issuing the violation notice. She cites Buckley v. Fitzsimmons, 509 U.S. 259 (1993) for the proposition that "if a constitutional wrong is complete before the case begins, the prosecutor is

entitled to only qualified immunity." (Pl. Memo, 4, quoting Buckley v. Fitzsimmons, 919 F.2d 1230, 1241-42 (7th Cir. 1990). The problem with Taylor's argument is that she alleges no involvement by these defendants prior to receiving notice from Balzeigler. She makes no argument that the defendants were involved in, or had knowledge of, the investigation which led to the issuance of the violation." (App. at 11 ¶1)

An adequate notice of violation in an IPMC case is tantamount to a conviction under the IPMC. The Petitioner, or anyone else, can not have a fair trial without a proper notice of violation. The prosecutors were never acting within the scope of their duties of the IPMC and in accordance with the IPMC and state law; the prosecutor can never initiate a charge for violation of the IPMC, nor any ordinance. (App at 14, §106.2) (SC Code of Laws 6-7-80) Subsequently, Petitioner's well established constitutional rights will always be violated before the case can be prosecuted under the IPMC.

It is undisputed that the notice of violation is a constitutional requirement to due process of law as guaranteed under the 14th Amendment to the U. S. Constitution. It is also a well established constitutional right that was violated before the case began. It is the element of proof necessary to obtain a conviction. The prosecutors have an inherent and legal duty to ensure that defendant's constitutional rights are protected. Therefore, the prosecutors must protect Defendants' constitutional rights by ensuring that the notice of violation is adequate.

The only major difference in Buckley and Petitioner's case is the person who committed the constitutional wrong in this case was the code enforcement officer not the prosecutor. The only similarity is that a constitutional right was violated before the case began

The Magistrate Judge, the District Judge, and the Court of Appeals' Judges overlooked the fact that a constitutional violation before the case begins is a constitutional violation regardless of who committed the constitutional violation. Article VI § 3 of the U.S. Constitution provides that all judicial officers are bound by Oath or Affirmation to support the Constitution. The Supremacy Clause of Article VI § 2 of the U.S. Constitution provides that the Constitution is the supreme law of the land; any claim of immunity must yield to it.

As discussed above, a constitutional violation takes precedence over a claim of immunity; the Court of Appeals erred in affirming the District Court's Order. This Court should issue a Writ of Certiorari

III. MUNICIPAL PROSECUTORS CANNOT BE DISMISSED FROM A CASE IN THEIR OFFICIAL CAPACITIES PURSUANT TO RULE 12(6) UNDER A THEORY OF REDUNDANCY.

The Defendants Todd, Thye, and Swanson sought dismissal in their official capacities as being redundant to the action against the City of Columbia. (Rec. Doc 21, p.1) The Defendants cited Brandon v. Holt, 469 U.S. 464 (1985) to support the redundancy argument. (Rec. Doc 21-2, pp. 5-6)

The U.S. Magistrate Judge's Report and Recommendation rejected the redundancy theory based on Brandon, id. It reasoned that: "In Brandon, the Supreme Court held that a claim against a municipal official in his official capacity was actually a claim against the municipality. This holding, however, does not compel a conclusion that the defendants should be dismissed in their

official capacities. As the court observed in Chase v. City of Portsmouth, 428 F.Supp. 2d 487, 489 (E.D.Va. 2006):

> While Supreme Court precedent shows that there is, in effect, no difference between suing the City and suing the City Council Members in their official capacities, that precedent does not require the district courts to dismiss the claims against the Council Members. Motions to dismiss under Rule 12(b)(6) test the validity of a complaint. Simply because a claim is redundant does not necessarily mean that the complaint is invalid. (Internal citations omitted).

The court further observed that naming the municipal officials "specifically in the same case, even through damages cannot be obtained from them, does provide a certain level of public accountability." Id. at 490. Since the City and the defendants are represented by the same attorney, no prejudice will result in these defendants remaining in the case in their official capacities." (App. at 11-12)

The District Court did not accept the magistrate's recommendation that the defendants should not be dismissed as parties in their official capacities, and opined: "Federal law treats an action against defendants in their official capacities as an action against the municipality, and state law does not require a plaintiff to individually name official employees if the government agency is named as a party to the action. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity."); S.C. Code Ann. § 15-78-70(c) (1976) ("[A] person, when bringing an action against a governmental entity under provisions of [the South Carolina Tort Claims Act], shall name as a party defendant

only the agency or political subdivision for which the employee was acting and is not required to name the employee individually...."). Because plaintiff has named the City of Columbia as a defendant in this case, it is redundant for plaintiff also to name city prosecutors in their official capacities as parties to the action. Therefore, the court grants defendants' motion to dismiss and dismisses defendants as parties in their official capacities on grounds of redundancy." (App. at 6 ¶2)

South Carolina Code Ann. section 15-78-70 also specifically provides that government employees may be liable in tort actions:

(a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting **within the *scope of his official duty*** is not liable therefore except as expressly provided for in subsection (b).

(b) Nothing in this chapter may be construed to give an employee of governmental entity immunity from suit and liability if it is proved that the employee's conduct was **not within the *scope of his official duties*** or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude....
(Emphasis added).

The South Carolina Torts Claims Act permits suit and liability against these defendants in their official capacities because as discussed above their conduct was not within the scope of their official duties and their conduct constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude... Subsequently, claims against the municipal prosecutors are not redundant against the City of Columbia.

Additionally, immunity under the statute is an affirmative defense that must be proved by the defendant at trial. Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct. App. 1999). In Brandon, id, the case had already been tried by a jury and is unlike the instant case which has not been tried by a jury.

The Court of Appeals erred in affirming the District Court's Order to grant the motion to dismiss defendants in their official capacities. (App. at 2)

IV. MUNICIPAL PROSECUTORS IN THE JUDICIAL PHASE OF A CASE BEING ENTITLED TO ONLY QUALIFIED IMMUNITY IN THEIR INDIVIDUAL CAPACITIES FOR LIABILITY UNDER 42 U.S.C. 1983 IS A NOVEL ISSUE OF LAW.

Municipal and county governments throughout the United States have adopted the International Property Maintenance Code as one of their governing ordinances. In an effort to get to a level of uniformity governing existing structures and dwelling units, there are more than 35 states that have given local governments authority to adopt the IPMC published by the International Code Council (ICC). (www.iccsafe.org)

The mandated notice of violation is the element of proof needed to sustain a conviction of the IPMC. Since the notice of violation is always issued by a code enforcement officer, the municipal prosecutor can never initiate a case. The only time that a municipal prosecutor is involved in a case is when the defendant requests a jury trial. Therefore, it is imperative that the prosecutor have a valid notice of violation in order to be acting within the scope of duties of the IPMC.

There are several other cases where defendants have been charged violating the International Property Maintenance Code for trash and debris. However, the notice of violation was not an issue in these cases and the Courts did not sua sponte rule on the violation of the constitutional right to due process of law guaranteed by the 14th Amendment to the Constitution as required by Article VI. §§ 2, 3.

As the facts in this case indicate, the constitutional rights of Petitioner, as well as thousands of citizens, will not be protected when municipal prosecutors not acting within the scope of their official duties for violation of an ordinance are granted absolute immunity.

Prosecutors who pursue a case without a proper notice of violation are only entitled to qualified immunity. There is no case law on prosecutors whose actions in the judicial phase of a case are not entitled to absolute immunity to liability under 42 U.S. 1983. This Court should agree to hear this case. It is a novel issue of law which greatly concerns the public's constitutional right to due process and equal protection of the laws under the 14th Amendment to the U.S. Constitution.

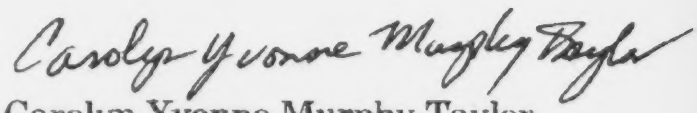
CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit which affirmed the District Judge's order which accepted the U.S. Magistrate Judge's Report and Recommendation to grant absolute immunity to the Defendants in their individual capacities, and dismissed

the defendants as parties in their official capacities on grounds of redundancy.

February 12, 2009.

Respectfully submitted,



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Petitioner, *Pro Se*

Case: 08-1372 Document: 17 Date Filed: 08/25/2008

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1372

Carolyn Yvonne Murphy Taylor, Plaintiff – Appellant,

v.

Walter Todd, Esq., in his official capacity as Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity: Hunter P. Swanson, Esq. in her official capacity as Assistant City Attorney and her individual capacity,

Defendants – Appellees,

and

City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Chief District Judge. (3:07-cv-00983-JFA-JRM)

Submitted: August 21, 2008 Decided: August 25, 2008

Before WILLIAMS, Chief Judge, and KING and DUNCAN, Circuit Judge

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PER CURIAM:

Carolyn Yvonne Murphy Taylor appeals the district court's order accepting in part and declining in part the magistrate judge's recommendation, dismissing her action filed under 42 U.S.C. § 1983 (2000) and the South Carolina Torts Claims Act. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Taylor v. Todd, No. 3:07-cv-00983-JFA-JRM (D.S.C. Feb 29, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

Case: 08-1372 Document: 21 Date Filed: 09/22/2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1372
(3:07-cv-00983-JFA-JRM)

Carolyn Yvonne Murphy Taylor, Plaintiff – Appellant,

v.

Walter Todd, Esq., in his official capacity as Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity: Hunter P. Swanson, Esq. in her official capacity as Assistant City Attorney and her individual capacity,

Defendants – Appellees.

and

City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity,

Defendants.

ORDER

The Court denies the Petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Williams, Judge King, and Judge Duncan.

For the Court
/s/ Patricia S. Connor, Clerk

Case: 3:07-cv-00983-JFA-JRM Document #:72
Date Filed: 2/29/08

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

Civil Action No. 3:07-983-JFA-JRM

Carolyn Yvonne Murphy Taylor,
Plaintiff,
vs.

City of Columbia; Charles P. Austin, in his official capacity as City Manager and in his individual capacity; Walter Todd, Esq., in his official capacity As Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity; Hunter P. Swanson, Esq., in her official capacity as Assistant City Attorney and her individual capacity; Donnie Balzeigler, in his official capacity as Code Enforcement Officer and his individual capacity; Larry McCall, in his official capacity as Chief Code Enforcement Officer and his individual capacity,
Defendants.

ORDER

This matter is before the court for review of the magistrate judge's report and recommendation dated February 7, 2008, made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02 (D.S.C.).

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections. The Court is not bound by the recommendation of the

magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendations as to which an objection is made. However, the Court is not required to review, under a *de novo* or any standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendations which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations. *Wallace v. Housing Auth. Of the City of Columbia,* 791.F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

This is a *pro se* action pursuant to 42 U.S.C. § 1983 and the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10, *et seq.* On April 12, 2007, plaintiff filed this action against defendants alleging civil rights violations pursuant to 42 U.S.C. § 1983, civil rights conspiracy pursuant to 42 U.S.C. § 1985, and state law claims for intentional infliction of emotional distress and malicious prosecution. On July 31, 2007, defendants Walter Todd, Dana M. Thye, and Hunter P. Swanson filed a motion to be dismissed as parties in their individual and official capacities. On September 7, 2007, plaintiff filed a response in opposition to the motion in which she opposed dismissal of defendants in their individual capacities as to all claims, except those against defendants in their official capacities pursuant to § 1983.[1] On September 13, 2007, defendants filed their reply. A hearing was held on January 11, 2008, and on February 7, 2008, the magistrate judge filed a detailed and comprehensive report and recommendation ("report") recommending that the motion to dismiss defendants in their individual capacities be granted, and

[1] In the response, plaintiff indicated that she did not object to dismissal of defendants in their official capacities from the § 1983 claims on the grounds of redundancy.

that the motion to dismiss defendants in their individual capacities be denied. Defendants filed objections to the report on February 20, 22008, and plaintiff filed objections on February 26, 2008.

In light of the standard set out above, after reviewing *de novo* the law and the report and recommendation of the magistrate judge, the court is of the opinion that further oral argument would not aid in the decisional process and that the recommendation of the magistrate judge to dismiss defendants in their individual capacities on grounds of prosecutorial immunity should not be disturbed.

However, the court rejects the magistrate's recommendation that the defendants should not be dismissed as parties in their official capacities. Federal law treats an action against defendants in their official capacities as an action against the municipality, and state law does not require a plaintiff to individually name official employees if the government agency is named as a party to the action. *See Kentucky v. Graham,* 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity."); S.C. Code Ann. § 15-78-70(c) (1976) ("[A] person, when bringing an action against a governmental entity under provisions of [the South Carolina Tort Claims Act], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually...."). Because plaintiff has named the City of Columbia as a defendant in this case, it is redundant for plaintiff also to name city prosecutors in their official capacities as parties to the action. Therefore, the court grants defendants' motion to dismiss and dismisses defendants as parties in their official capacities on grounds of redundancy.

For the foregoing reasons, the court adopts and incorporates by reference those portions of the report and

recommendation of the magistrate judge that are consistent herewith. Plaintiff's objections are overruled, and the motion to dismiss defendants in their individual and official capacities is granted.

IT IS SO ORDERED.

February 29, 2008
Columbia, South Carolina

/s/ Joseph F. Anderson, Jr.
United States District Judge

Case: 3:07-cv-00983-JFA-JRM Document #: 60
Date Filed: 02/07/08

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

Civil Action No. 3:07-983-JFA-JRM

Carolyn Yvonne Murphy Taylor,
Plaintiff,
vs.

City of Columbia; Charles P. Austin, in his official capacity as City Manager and in his individual capacity; Walter Todd, Esq., in his official capacity As Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity; Hunter P. Swanson, Esq., in her official capacity as Assistant City Attorney and her individual capacity; Donnie Balzeigler, in his official capacity as Code Enforcement Officer and his individual capacity; Larry McCall, in his official capacity as Chief Code Enforcement Officer and his individual capacity,
Defendants.

REPORT AND RECOMMENDATION

Plaintiff, Carolyn Yvonne Murphy ("Taylor"), filed this pro se action on April 12, 2007, against the City of Columbia, South Carolina ("the City") and several of its employees after a prosecution for violation of the City's International Property Maintenance Code ("IPMC") was dismissed. Taylor alleges violation of her rights to procedural and substantive due process and equal

protection pursuant to Title 42 U.S.C. § 1983, as well as pendant state tort claims.[2]

On July 31, 2007, defendants Walter Tood, Danna M. Thye and Hunter P. Swanson ("hereafter "the defendants") moved pursuant to Fed. R..Civ.P. 12 that they dismissed as parties. They assert that they are entitled to absolute prosecutorial immunity in their individual capacities. They also assert, to the extent they are sued in their official capacities, that they should be dismissed because the case is redundant to the case alleged against the City. Because Taylor is pro se, an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) was issued explaining her responsibility to respond to the motion. Taylor filed her response on September 7, 2007. The defendants filed a reply on September 13, 2007. A hearing was held on the motion and other matters on January 11, 2008. Taylor was granted leave to file additional briefing, and she filed a supplemental response in opposition to the motion to dismiss on January 22, 2008. The defendants filed a reply to that brief on February 1, 2008.

1. Individual Capacity

A prosecuting attorney enjoys absolute immunity for acts taken in the conduct of his judicial or quasi-judicial distraction. In the case of Imbler v. Patchman, 424 U.S. 409 (1976), the United States Supreme Court noted that a prosecutor's is predicated on a concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. Id. 422.

The court affirmed that prosecutorial immunity was one of the immunities which evolved through the common law and declined to limit it to a qualified immunity, stating,

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[2] This case was automatically referred to the undersigned for pretrial matters pursuant to 28 U.S.C. § 636 and Local Rule 73.02(B)(2)(d) and (e).

"We conclude that considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." Id. 427. The court also determined that "An absolute immunity defeats a suit at the outset...." Imbler, supra at 419.

Following Imbler, courts have used a "functional" approach to determine whether absolute immunity would apply to prosecutors under § 1983. Generally, a "prosecutor performing duties of initiating a prosecution or presenting a case is entitled to absolute immunity in an action for damages claiming that the prosecutor violated the plaintiff's constitutional rights." Ostrzenski v. Seigel, 177 F.3d 245, 249 (4th Cir. 1999). Thus, a prosecutor's acts "intimately associated with the judicial phase of criminal process" are afforded absolute immunity. Id. At 250, quoting Imbler, 424 U.S. 430-31. On the other hand, prosecutors are not entitled to absolute immunity when they are performing investigative or administrative functions. Burns v. Reed, 500 U.S. 478, 491-93 (1991)

Taylor alleges in her complaint that the defendants are employed by the City as Assistant City Attorneys (Complaint, ¶ 6-8). It is undisputed that the defendants serve as Prosecutors in the City's municipal court. The first involvement of these defendants is alleged to have occurred after Taylor had been cited for violation of the IPMC and requested a jury trial. She received a notice of the trial at which Thye would be representing the City. (Complaint, ¶ 25). The majority of the remaining allegations concern continuances of her trial by the defendants and notices sent for new trial dates. However, during this process, Thye moved for and obtained an order allowing the City to inspect the area behind Taylor's privacy fence. (Complaint, ¶ 36). Eventually, Swanson nolle prossed the case. (Complaint, ¶ 58).

The undersigned concludes that the defendants are entitled to absolute immunity. All of their alleged actions took place after Taylor had been noticed for the violations and involved their role in the judicial process. This would

include Thye's efforts to obtain an order to obtain evidence after the violation notice had been served. Carter v. Burch, 34 F.3d 257, 263 (4th Cir.1994) ("Preparation, for the initiation of the criminal process and for a trial may require obtaining, reviewing, and evaluating evidence.").

In her supplemental memorandum, Taylor argues that absolute immunity should not apply to the defendants because the alleged constitutional violation occurred prior to the beginning of the judicial portion of the case. In this regard, Taylor argues that the constitutional violation occurred when the Code Enforcement Officer, Donnie Balziegler, failed to give her the proper notice required by the IPMC before issuing the violation notice. She cites Buckley v. Fitzsimmons, 509 U.S. 259 (1993) for the proposition that "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity." (Pl. Memo, 4, quoting Buckley v. Fitzsimmons, 919 F.2d 1230, 1241-42 (7th Cir. 1990). The problem with Taylor's argument is that she alleges no involvement by these defendants prior to receiving notice from Balzeigler. She makes no argument that the defendants were involved in, or had knowledge of, the investigation which led to the issuance of the violation.

2. Official Capacity

The defendants also argue that insofar as they are sued in their official capacities, they should be dismissed because the City is a party and any claim against them is redundant. They cite Brandon v. Holt, 469 U.S. 464 (1985) as authority. In Brandon, the Supreme Court held that a claim against a municipal official in his official capacity was actually a claim against the municipality. This Holding, however, does not necessarily compel a conclusion that the defendants should be dismissed in their official capacities. As the court observed in Chase v. City of Portsmouth, 428 F.Supp. 2d 487, 489 (E.D.Va. 2006):

> While Supreme Court precedent shows that there is, in effect, No difference between suing the city and Suing the City Council Members in their official capacities, that precedent does not require the districts courts to dismiss the Claims against the Council Members. Motions to dismiss under Rule 12(b)(6) test the validity of a complaint. Simply because a claim is redundant does not necessarily mean that the complaint is invalid. (Internal citations omitted).

The court further observed that naming the municipal officials "specifically in the same case, even through damages cannot be obtained from them, does provide a certain level of public accountability." Id. at 490. Since the City and the defendants are represented by the same attorney, no prejudice will result in these defendants remaining in the case in their official capacities.

Conclusion

Based on a review of the record, and after hearing the arguments of the parties, it is recommended that the motion to dismiss defendants Todd, Thye, and Swanson in their individual capacities be granted, and their motion to be dismissed in their official capacities be denied.

Respectfully submitted,

/s/ Joseph R. McCrorey
United States Magistrate Judge

February 7, 2008
Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

3:07-cv-00983-JFA-JRM Date Filed 04/12/2007
Entry Number 1-2, Pages 8 to 44 of 139

EXHIBIT #5

EXCERPTS FROM SECTIONS OF THE 2000 INTERNATIONAL PROPERTY MAINTENANCE CODE

CHAPTER I
ADMINISTRATION

SECTION 101
GENERAL

101.1 Title. These regulations shall be known as the *Property Maintenance Code* of [NAME OF THE JURISDICTION], hereinafter referred to as "this code."

101.2 Scope. The provisions of this code shall apply to all existing residential and nonresidential structures and all existing premises and constitute minimum requirements and standards for premises, structures, equipment, and facilities for light, ventilation, space, heating, sanitation, protection from elements, life safety, safety from fire and other hazards, and safe and sanitary maintenance; the responsibility of owners, operators, and occupants; the occupancy of existing structures and premises, and for administration, enforcement and penalties.

101.3 Intent. This code shall be construed to secure its expressed intent, which is to ensure public health, safety and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises. Existing structures and premises that do not comply with these provisions shall be altered or repaired to provide a minimum level of health and safety as required herein.

SECTION 104
DUTIES AND POWERS OF THE CODE OFFICIAL

104.1 General. The code official shall enforce the provisions of this code.

104.4 Right of entry. The code official is authorized to enter the structure or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the code official is authorized to pursue recourse as provided by law.

104.6 Notices and orders. The code official shall issue all necessary notices or orders to ensure compliance with this code.

SECTION 106
VIOLATIONS

106.1 Unlawful acts. It shall be unlawful for a person, firm or corporation to in conflict with or in violation of any of the provisions of this code.

106.2 Notice of violations. The code official shall serve a notice of violation or order in accordance with Section 107.

106.3 Prosecution of violation. Any person failing to comply with a notice of violation or order served in accordance with Section 107 shall be deemed guilty of a misdemeanor, and the violation shall be deemed a strict liability offense. If the notice of violation is not complied with, the code official shall institute the appropriate proceeding at law or equity to restrain, correct or abate such violation, or to require the removal or termination of the unlawful occupancy of the structure in violation of the provisions of this code or the order or direction made pursuant thereto.

106.4 Violation penalties. Any person who shall violate a provision of this code, or fail to comply therewith, or with any of the requirements thereof, shall be prosecuted within the limits provided by state or local laws. Each day that a violation continues after due notice has been served shall be deemed a separate offense.

SECTION 107
NOTICES AND ORDERS

107.1 - Notice to owner or to person or persons responsible. Whenever the code official determines that there has been a violation of this code or has grounds to believe that a violation has occurred, notice shall be given to the owner or the person or persons responsible therefore in the manner prescribed in Sections 107.2 and 107.3. Notice for condemnation procedures shall comply with section 108.3.

107.2 – Form. Such notice prescribed in Section 107.1 shall be in accordance with all of the following:

1. Be in writing.
2. Include a description of the real estate sufficient for identification.
3. Include a statement of the violation or violations and why the notice is being issued.
4. Include a correction order allowing a reasonable time to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of this code.
5. Inform the property owner of the right to appeal.

CHAPTER 2
DEFINITIONS

SECTION 201
GENERAL

201.1 Scope. Unless otherwise expressly stated, the following terms shall, for the purpose of this code, have the meanings shown in this chapter.

201.4 Terms not defined. Where the terms are not defined through the methods authorized by this section, such terms shall have ordinarily accepted meanings such as the context implies.

SECTION 202
GENERAL DEFINITIONS

CODE OFFICIAL. The official who is charged with the administration and enforcement of this code, or any duly authorized representative.

DWELLING UNIT. A single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.

EXTERIOR PROPERTY. The open space on the premises and on adjoining property under the control of owners or operators of such premises.

PREMISES. A lot, plot or parcel of land including any structure thereon.

STRUCTURE. That which is built or constructed or a portion thereof.

STRICT LIABILITY OFFENSE. An offense in which the prosecution in a legal proceeding is not required to prove criminal intent as a part of its case. It is enough to prove

the defendant either did an act which was prohibited, or failed to do an act which the defendant was legally required to do.

YARD. An open space on the same lot with a structure.

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EXHIBIT #2[3]

P*

WARNING
NOTICE OF VIOLATION

The Municipal Code of the City of Columbia, SC, Sections 8-31, 8-32, 8-33, 8-34, 8-35, 8-301, 8-302, 8-303, 8-304 and 8-305, prohibits the following accumulations:

VIOLATION

Lots and premises are required to be properly cut and cleared of all overgrowth, undergrowth, trash, debris, vines, weeds, and rank vegetation. This includes hedge rows, ditches, fences, and around trees. Such accumulations of growth or debris have been found to be a health detriment by the City of Columbia.

FAILURE TO COMPLY WITH NOTICE

If the person to whom the notice is directed, fails to comply with the City Ordinance(s) within (10) days after such notice is served, accumulations may then be removed by a duly authorized agent of the City, and the cost of doing so shall become a lien upon the property affected and shall be collected in the same manner as municipal taxes are collected.

According to the property ownership records, you are the owner of the property located at: 3019 & nx to 3019 Schoolhouse Rd*

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[3] Petitioner discovered that the District Court inadvertently did not scan Exhibit #2. However, Exhibit #2 is located in Exhibit #20 at page 130 of 139.

NAME*: Carolyn Taylor Murphy

ADDRESS*: 2295 Byrnes Dr Cola SC 29204

T.M.S. NUMBER* 11513-4-2,3

NOTICE ISSUED*: 12-9-04

NOTICE EXSPIRES*: 12-23-04

REMARKS*: Remove All Misc Items, materials, Debris, And Objects From Premise Grounds

IF NO ACTION HAS BEEN TAKEN WITHIN TEN (10) DAYS, YOU MAY BE SUBJECT TO THE PENALTIES PRESCRIBED FOR VILOLATIONS OF THIS ORDINANCE

DATE*: 12-9-04

ISSUING OFFICER: /s/D. Balzeigler

CITY INSPECTIONS DEPARTMENT (803) 545-3430

NOTE: FAILURE TO ABATE COULD RESULT IN A SUMMONS BEING ISSUED FOR FAILURE TO COMPLY.

MINIMUM FINE: $465.OO
ADDITIONAL COURT & ABATEMENT COSTS MAY APPLY.
MUNICIPAL CODE SEC. 8-38

*** indicates handwritten**

EXHIBIT #1

CITY OF COLUMBIA
UNIFORM ORDINANCE SUMMONS
NO. 7580

CITY OF COLUMBIA **VERSUS**

LAST NAME	FIRST NAME	MIDDLE NAME
Taylor	Carolyn	M

ADDRESS		
2295 BYNES DR	Columbia SC	29204

DOB	RACE	SEX	HT	WT	HAIR	EYES	DL#
11-27-1946	B	F	5'9"	230		Brn	001583972

YOU ARE SUMMONED TO APPEAR BEFORE THE MUNICIPAL JUDGE FOR THE CITY OF COLUMBIA AT 811 WASHINGTON STREET, COLUMBIA, SOUTH CAROLINA ON

Date of Trial	AT	Time of Trial	FOR A TRIAL CONCERNING
4-11-05		8 am	

VIOLATION OF CITY OF COLUMBIA ORDINANCE:

Ordinance Section No	Date Issued	Bond Amount
2000-027	3-11-05	$ 153.75

Description of Ordinance		Charge Code
Unlawful Acts	International Property Maintenance	PMCA

Date of Violation	Time of Violation	Place of Violation
3-11-05	10 00 AM PM	2295 Byrnes Dr

Name of Issuing Officer	Employee No /Dept	Title
Donnie Balzeigler	09021 / Development Services	Code Enforcement Officer

Please see reverse side for instructions on how to post the bond and important regarding your rights. The issuing officer cannot accept the bond. Bond must be received prior to the date and time you are required to appear.

NOTICE

FAILURE TO APPEAR BEFORE THE COURT WITHOUT HAVING POSTED BOND OR WITHOUT HAVING BEEN GRANTED A CONTINUANCE BY THE COURT IS A MISDEMEANOR PUNISHABLE BY A FINE UP TO $200 OR IMPRISONMENT FOR UP TO 30 DAYS.

WHITE COPY COURT YELLOW COPY VIOLATOR PINK COPY ISSUING OFFICER

Case: 3:07-cv-00983-JFA-JRM Document #:68
Date Filed: 2/26/08

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 3:07-983-JFA-JRM

Carolyn Yvonne Murphy Taylor, Plaintiff, v. City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Walter Todd, Esq., Assistant City Attorney, Columbia, S.C; Dana M. Thye, Esq., Assistant City Attorney, Columbia, S.C; Hunter P. Swanson, Esq., Assistant City Attorney, Columbia, S.C; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity, Defendants.	**PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Pro Se Plaintiff submits these objections to the Report and Recommendation by United States Magistrate Judge Joseph R. McCrorey filed February 7, 2008.

Taylor objects to the following:

1. The statement in the Report and Recommendation on page 1 first paragraph which states: "Taylor alleges violation of her rights to procedural and substantive due process and equal protection pursuant to Title

42 U.S.C. # 1983, as well as pendant state tort claims."The Magistrate Judge erred in omitting claims in the Amended Complaint since a determination would have to be made as to which claims are entitled to absolute immunity pursuant to Title 42.U.S.C. 1983.

2. The conclusion in the Report and Recommendation on page 3 second paragraph which states: "The undersigned concludes that the defendants are entitled to absolute immunity. All of the alleged actions took place after Taylor had been noticed for the violations and involved their role in the judicial process. This would include Thye's efforts to obtain evidence after the violation notice had been served. Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994) ("Preparation, both for the initiation of the criminal process and for trial, may require obtaining, reviewing, and evaluating evidence.")." The Magistrate Judge erred in concluding that the Municipal Prosecutors are entitled to absolute immunity for "their role in the judicial process" since he did not give due consideration to prosecution of International Property Maintenance.

3. The rationale in the Report and Recommendation on page 4 first paragraph which states: "The problem with Taylor's argument is that she alleges no involvement by these defendants prior to receiving notice from Balzeigler. She makes no argument that the defendants were involved in, or had knowledge of, the investigation which led to the issuance of the violation." The Magistrate Judge erred in his rationale for recommending absolute immunity to these Municipal

Prosecutors for a constitutional violation that occurred before the case began and was committed by the Code Enforcement Officer.

4. The reliance on the analysis of the cases of Imbler v. Pachtman, 424 U.S. 409 (1976) and Ostrzenski v. Seigel, 177 F.3d 245, 249 (4th Cir. 1999) quoting Imbler is misplaced. The Magistrate Judge erred in his application of the authorities cited to support absolute immunity for the Municipal Prosecutors since the facts are misinterpreted.

5. The Report and Recommendation fails to address Taylor's arguments #2 and # 3 in the Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson. The Magistrate Judge erred in failing to give due consideration to arguments #2 and # 3 in the Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson since there is no precedent for absolute immunity for municipal prosecutors of the International Property Maintenance Code.

6. The conclusion on page 5 of the Report and Recommendation which states: "Based on a review of the record, and after hearing the arguments of the parties, it is recommended that the motion to dismiss defendants Todd, Thye, and Swanson in their individual capacities be granted, ..." The Magistrate Judge erred in recommending "that the motion to dismiss defendants Todd, Thye, and Swanson in their individual capacities be granted..." since facts and law cited do not support this recommendation.

FACTS

The facts are set forth in the Memorandum in Objection to the Motion to Dismiss by the Defendants Todd, Thye, and Swanson and are incorporated herein by reference.

ARGUMENTS

1. **The Magistrate Judge erred in omitting claims in the Amended Complaint.**

Taylor objects to the statement in #1 above because there are seven claims in the Amended Complaint and the claims are not clearly identified in the Report and Recommendation. The conspiracy claim under 42 U.S.C. 1985 and the refusing or neglecting to prevent claim under 42 U.S.C. 1983 have been omitted from the Report and Recommendation. (Amended Complaint) The state tort claims for intentional infliction of emotional distress and malicious prosecution have not been named. (Amended Complaint) It is necessary to name all of the claims in order to determine which claims the absolute immunity would apply under 42 U.S.C. 1983 to the Defendants. All of these claims are not entitled to absolute immunity based on the cases cited in the Report and Recommendation to justify granting a blanket absolute immunity to the defendants Todd, Thye, and Swanson. The Magistrate Judge erred by not including all claims.

2. **The Magistrate Judge erred in concluding that the Municipal Prosecutors are entitled to absolute immunity for "their role in the judicial process".**

Taylor objects to the conclusion in the Report and Recommendation: "The undersigned concludes that the defendants are entitled to absolute immunity. All of the

alleged actions took place after Taylor had been noticed for the violations and involved their role in the judicial process. This would include Thye's efforts to obtain evidence after the violation notice had been served. Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994) ("Preparation, both for the initiation of the criminal process and for trial, may require obtaining, reviewing, and evaluating evidence.")." because the Report and Recommendation fails to consider that the Municipal Prosecutors were not advocates for a violation of the International Property Maintenance Code and there was no need for Thye to obtain evidence through a motion under section 104.4 of International Property Maintenance Code which only gives the code enforcement officer the right of entry to do an inspection.

This case is controlled by the International Property Maintenance Code (IPMC) which has, among other things, an expressed intent to govern existing buildings, a mandated notice of violation requirement which determines the innocence or guilt of a violator, and declares a violation of the IPMC a strict liability offense. (Exhibit 5 in the Original Complaint, IPMC sections 101.3, 107.2, & 106.3)

Imbler v. Patchtman found that "...a prosecutor enjoys absolute immunity from 1983 suits for damages when he acts within the scope of his prosecutorial duties." The only authority of Municipal Prosecutors Todd, Thye, and Swanson in this case is within the scope of the IPMC. An Assistant City Attorney does not become a prosecutor for violation of the IPMC until there has been issued a notice of violation as mandated in section 107.2 of the IPMC.

The IPMC Section 106.3 Prosecution of violation states in pertinent part:

> "Any person failing to comply with a notice of violation or order served in accordance with Section 107 shall be deemed guilty of a misdemeanor, and the violation shall be deemed a strict liability offense. If the notice of violation is not complied with, the code official shall institute

> the appropriate proceeding at law or equity to restrain, correct or abate such violation, or to require the removal or termination of the unlawful occupancy of the structure in violation of the provisions of this code or of the order or direction made pursuant thereto."

The Assistant City Attorneys have not met their burden of proof by showing that they are in fact prosecutors for violations of the IPMC and The Report and Recommendation does not find that they were prosecutors for the IPMC with a proper notice of violation. Instead of prosecutors, the Magistrate Judge characterizes their actions as "their role in the judicial process" and erred by concluding that "their role in the judicial process" entitles them to absolute immunity.

The Defendants actions in this case are clearly not indicative of an advocate for prosecuting Taylor for violations of the IPMC. The Defendants admit that Taylor was charged under the IPMC with not removing debris and other materials from her yard. (Defendants Objection to the Report and Recommendation of the Magistrate Judge, p.2 footnote #1) The intent of the IPMC being to governing existing structures and the notice of violation mandating: "3. Include a statement of the violation and why the notice is being issued, and 4. Include a correction order allowing a reasonable time to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of this code.", the mandated notice of violation requires an order be issued telling Taylor what's wrong with her house and what needs to be done to bring her house back up to the IPMC. The Warning Notice of Violation issued by Balzeiger does not notify Taylor of her house violating the IPMC. Subsequently, the Defendants did not have a valid notice of violation which would give them the status of being a prosecutor against Taylor for violating the IPMC and did not have the authority to go beyond the scope of the IPMC to prosecute Taylor for not removing personal property from her yard.

It is undisputed that Municipal Prosecutors' duties as a prosecutor are very different from prosecutors on the Circuit Court level or State level. They can never issue a notice of violation or initiate a charge under the IPMC nor any City Ordinance. However, with an inherent, sworn, and legal duty of these Defendants to protect Taylor's clearly established constitutional rights and to be fair. These Defendants have violated Taylor's constitutional rights by not dismissing this case at the onset of the request for a jury trial, by requiring Taylor to remove personal property from her yard, by proceeding with the case for over 1 ½ years without a notice of violation as mandated by the IPMC, and by exceeding the authority of the International Property Maintenance Code as discussed above.

In very plain language, the Defendants are not prosecutors for the IPMC because they acted without the mandated notice of violation. They are not prosecutors because the law/IPMC says they aren't. They are prosecutors if and only if there is a notice of violation as mandated in section 107.2 of the IPMC which is required to prosecute a violation in section 106.3 of the IPMC. The International Property Maintenance Code must also be considered to determine whether Todd, Thye, and Swanson are entitled to absolute immunity.

The intent of the International IPMC is to govern existing structures. Id. That is Taylor's house, and did not require Thye to obtain evidence from behind Taylor's privacy fence in her yard that her house was in violation of the International Property Maintenance Code.

For purposes of no liability under 42 U.S.C. 1983, the Magistrate Judge has not shown that the defendants are entitled to absolute immunity as prosecutors who had a notice of violation as mandated in the International Property Maintenance Code and are advocates within the scope of the International Property Maintenance Code.

3. **The Magistrate Judge erred in his rationale for recommending absolute immunity to these Municipal Prosecutors for a constitutional violation that occurred before the case began and was committed by the Code Enforcement Officer.**

The Report and Recommendation on page 4 first paragraph accepts Taylor's argument in her Supplemental Memorandum in Objection to the Motion to Dismiss by Defendants Todd, Thye and Swanson which quotes in Buckley v. Fitzsimmons, 509 U.S. 259 (1993) the standard that was used by the court in Buckley v. Fitzsimmons, 919 F.2d 1230, 1241-1242 (7th Cir. 1990). Then rationalizes that: "The problem with Taylor's argument is that she alleges no involvement by these defendants prior to receiving notice from Balzeigler. She makes no argument that the defendants were involved in, or had knowledge of, the investigation which led to the issuance of the violation."

Taylor objects to this rationale because it is flawed and clear error. Municipal Prosecutors by law would never have any involvement in the case prior to Taylor receiving the Warning Notice of Violation from Balzeigler (IPMC section 104.6) nor before the Uniform Ordinance Summons is served by Balzeigler on Taylor. (S.C. Code Ann. Section 56-7-80) There is no logical nexus for this rationale and the Municipal Prosecutors entitlement to absolute immunity when Taylor's argument #1 in her Supplemental Memorandum clearly sets out that the Municipal Prosecutors can never issue the mandated notice of violation and can never serve a Uniform Ordinance Summons. These are duties of the code enforcement officer not the municipal prosecutors. Argument #1 in the Supplemental Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson is incorporated herein by reference. Additionally, the Report and Recommendation has failed to cite any legal authority or precedent to support this conclusion.

Also, according to the plain and unambiguous language of the standard in Buckley which states "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity", there is no need to read beyond the words used in the standard.

Subsequently, under the plain language theory the only necessary inquiry by the Magistrate Judge is to determine if the constitutional violation occurred before the case began. The facts in this case are clear that the constitutional violation which is the Warning Notice of Violation dated December 9, 2004 was completed before the case began on March 11, 2005 when the Uniform Ordinance Summons was served on Taylor. It is undisputed in the Report and Recommendation and by the Defendants (Response to Plaintiff's Sup. Memo p.5 "The material facts are not in dispute...") that the constitutional wrong was completed before the case began. Subsequently there is only one legal conclusion that can be drawn and that is these Defendants are entitled only to qualified immunity.

4. **The Magistrate Judge erred in his application of the authorities cited to support absolute immunity for the Defendants.**

The facts relied upon nor the authorities used in the Report and Recommendation do not support the Magistrate Judge's rationale that Defendants Todd, Thye and Swanson are entitled to absolute immunity to all claims in the Amended Complaint. A logical nexus between the law and the facts in this case is missing. The Magistrate Judge did not give full consideration to all of the facts in this case and the International Property Maintenance Code as discussed in arguments # 2 and #3 above, in arguments #2 and #3 of the Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson, and in argument #1 of the Supplemental Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and

Swanson. All preceding arguments just cited are incorporated herein by reference.

Taylor objects to the cases cited to support absolute immunity. The Magistrates Judge cites two cases Imbler v. Pachtman, 424 U.S. 409 (1976) and Ostrzenski v. Seigel, 177 F.3d 245, 249 (4th Cir. 1999) quoting Imbler to support absolute immunity for the Defendants on all claims. In actuality only one case is cited is Imbler. However, the Report and Recommendation misinterprets Imbler and Ostrzenski under the facts of this case.

The Imbler case applies to a State prosecutor who was acting within the scope of his duties in initiating and pursuing a criminal prosecutor and in presenting the State's case. The Court opined that these acts are absolutely immune from civil suit for damages under 42 U.S.C. 1983. The Report and Recommendation summarizes that all of the Defendants actions involved their role in the judicial process and finds that Swanson nolle prossed the case and Thye obtained an order to inspect the area behind Taylor's privacy fence. Since none of the Municipal Prosecutors were acting under the scope and authority of the International Property Maintenance Code and as advocates for violation of the International Property Maintenance Code with the mandated notice of violation as discussed above, they are not entitled to absolute immunity. The facts of a State Prosecutor acting within the scope of State law do not apply to Municipal Prosecutors not acting within the scope of the International Property Maintenance Code. Therefore, the Magistrate Judge's reliance on Imbler is faulty, erroneous and does not apply to this case. These Defendants are only entitled to qualified immunity.

The Ostrzenski case applies to the defendant who was acting in a quasi-judicial capacity as a peer reviewer at the direction of the Maryland Board of Physician Quality Assurance when he conducted his investigation of the

plaintiff's records, and filed his report on the findings of the investigation. The court found the defendant peer reviewer had absolute quasi-judicial immunity in the role of investigating and reporting on plaintiff's practice and records. The facts in the instant case as discussed above are not remotely similar to the facts in Ostrzenski. Ostrzenski simply does not apply in the Report and Recommendation and fails to carry the burden of demonstrating an entitlement to absolute immunity for these Municipal Court Prosecutors. Therefore, the Magistrate Judge's reliance on Ostrzenski is faulty, erroneous and does not apply to this case. These Defendants are only entitled to qualified immunity.

5. **The Magistrate Judge erred in failing to give due consideration to arguments #2 and # 3 in the Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson which states: "Absolute immunity does not apply to the Defendants who did not initiate a charge that is a strict liability offense under the IPMC without the mandated notice of violation (probable cause)." and "This is a novel issue of law for denial of absolute immunity in the 21st century and these Defendants should be denied absolute immunity." respectively.**

The Report and Recommendation is a perfect example of this being a novel issue of law for granting qualified immunity to these Defendants in the 21st century. The Magistrate failed to give due consideration to Taylor's arguments #2 and #3 in her Memorandum in Objection to the Motion to Dismiss By the Defendants Todd, Thye, and Swanson and produced a Report and Recommendation chocked full of errors of law and facts as discussed herein and therein.

There is no case law on liability of Municipal Prosecutors of the International Property Maintenance Code who act within the scope or who do not act within the scope of the International Property Maintenance Code and do not have the authority to ever initiate a charge. The Magistrate Judge erred in failing to give due or full consideration to Taylor's arguments.

6. **The Magistrate Judge erred in recommending "that the motion to dismiss defendants Todd, Thye, and Swanson in their individual capacities be granted..."**

Taylor objects to this recommendation because it is generalized to the claims referenced on page 1 of the Report and Recommendation and is not be specific as to which Claims in the Amended Complaint the absolute immunity would apply. A review of the record and defendants arguments do not support these defendants having absolute immunity for being called a prosecutor because they were in the Municipal Court when they were in fact not advocates for violation the International Property Maintenance Code. The Municipal Prosecutors were not advocates for the City because they changed the intent of the International Property Maintenance Code and disregarded the mandated notice of violation requirements. See argument #2 above.

The instant case has no similarity to any of the authority cited in the Report and Recommendation as discussed in argument #4 above. The defendants failed to meet the burden of proof to demonstrate that they were acting within the scope and authority of International Property Maintenance Code. This Recommendation for absolute immunity is not supported by the Report. The Magistrate Judge has erred in finding that these Defendants are entitled to absolute immunity on all claims.

CONCLUSION

The recommendation of absolute immunity for the Defendants is not based on any case law for a Municipal Prosecutor who has a legal duty to protect constitutional rights and a legal duty to proceed in court if and only if there is a notice of violation as mandated in section 107.2 of the International Property Maintenance Code that was issued before the case began. The Municipal Prosecutors had no probable cause to believe that Taylor had violated the International Property Maintenance Code for her house needing to comply with the International Property Maintenance Code. Absolute immunity to all claims in their individual capacities of Defendants Todd, Thye, and Swanson has not been documented in the Report and Recommendation of the Magistrate Judge through the facts and conclusions of law.

For the reasons discussed above, arguments #2 and #3 of the Memorandum in Objection to the Motion to Dismiss, argument #1 of the Supplemental Memorandum in Objection to the Motion to Dismiss, and the arguments at the hearing, the *Pro Se* Plaintiff objects to report and recommendation that that these defendants are entitled to absolute immunity in their individual capacities on all claims.

Respectfully submitted,

February 26, 2008

/s/Carolyn Yvonne Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
803-309-0487 (cell)

Plaintiff, *Pro se*

Case: 3:07-cv-00983-JFA-JRM Document #:33 Date Filed: 9/7/08

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 3:07-983-JFA-JRM

Carolyn Yvonne Murphy Taylor, Plaintiff,	)
City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Walter Todd Esq., Assistant City Attorney, Columbia, S.C; Dana M. Thye, Esq., Assistant City Attorney, Columbia, S.C; Hunter P. Swanson, Esq., Assistant City Attorney, Columbia, S.C; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity, Defendants.	) **MEMO-**) **RANDUM**) **IN OB-**) **JECTION**) **TO THE**) **MOTION**)**TO DISMISS**) **DEFEN-**) **DANTS**) **TODD,**) **THYE**) **AND**) **SWANSON**)

INTRODUCTION

Suit was filed in this case on multiple grounds, including violations of procedural and substantive due process, equal protection, refusing or neglecting to prevent, conspiracy, intentional infliction of emotional distress, and malicious prosecution. The issue before the court is whether Defendants Todd, Thye, and Swanson should be dismissed from this action on grounds of immunity. Under the facts of this case and the law, the Defendants' motions must be denied.

FACTS

Taylor was served with a Notice of Violation ("Notice") dated December 9, 2004, citing violations of City ordinances 8-31 through 8-35 and 8-301 through 8-304. The Notice cited no violations of the International Property Maintenance Code (IPMC). Taylor had previously been informed by City Code Enforcement Officers to maintain items stored in her yard a minimum of 18 inches off the ground and to keep them covered.

On March 11, 2005, Taylor was served with Uniformed Ordinance Summons No. 7580 for violation of the International Property Maintenance Code. The charge was for violation of Ordinance Section No. 2000-027 of the Municipal Code of Laws for the City of Columbia, unlawful acts, first offense. Taylor was told at that time all items in her yard should have been removed. She had received no prior notice of the alleged code violation, in contradiction of requirements of the IPMC.

On March 16, 2005, Taylor received a copy by mail, of page 9 from the 2003 IPMC, along with the cover, indicating she was in violation of section 302.1. That section requires an occupant to maintain all exterior property and premises in a clean, safe and sanitary condition. The following day, she received a copy of the Ordinance Bonds (City Charge Codes) in the mail. It showed a different charge code for violations in the notices earlier received pursuant to Code 8-31, et al, and the violation of the IPMC.

Taylor paid a $153.75 bond and requested a jury trial on April 11, 2005. She also conferred with McCall, a supervisor of inspectors that day. She was allowed to read the 2003 IPMC and its Commentary. Contrary to earlier representations made to Taylor, Section 104.6 requires prior notice of a code violation for the specific purpose of

allowing an accused to take corrective action. Section 107.2 mandates the specific requirements to be included in the notice. Taylor informed McCall of the misrepresentations, but no corrective action was taken.

The following month, Taylor returned to McCall's office to copy the 2003 IPMC. She was told that City Council had not adopted the 2003 IMPC and was given copies of the 2000 IMPC which had not been cited by the inspector **after** he had served her with the summons. Taylor was not allowed to review the 2003 IMPC again.

Thereafter, Taylor appeared at court on ten (10) different occasions for the trial by jury she had requested. Several different prosecutors appeared on behalf of the City of Columbia during this period. Prior to the trial date of September 23, 2005, Taylor called the Balzeigler to inspect her yard. Satisfied that Taylor had cleaned her yard, he asked to inspect the area behind her privacy fence. This was the first time such a request had been made. Upon Taylor's refusal, the inspector called McCall, who also asked to inspect the area behind her privacy fence. Taylor refused.

At the trial on January 13, 2006, Thye moved for an Order to compel Taylor to allow Inspectors to inspect behind her privacy fence by misrepresenting to the court that section 104.2 still gave the City a "right of entry". Taylor objected on grounds of unfair surprise and that she had been noticed solely for a jury trial on the issue of whether she was in violation of the IPMC on March 11, 2005. Taylor objected to Thye's motion, but it was granted. The trial was continued to allow the inspection of the area behind Taylor's privacy fence.

At the trial on March 10, 2006, Taylor motioned the court to dismiss the case for a failure to comply with the

notice provisions of the IPMC. The motion was denied. Taylor also motioned for a continuance, which was granted.

On May 3, 2006 Thye submitted a Proposed Order denying Taylor's Motion to Dismiss to Judge Hanna. The Order contained numerous errors of law and facts to which Taylor objected and requested that the misrepresentations be corrected. On May 8, 2006, Thye submitted another Proposed Order to Judge Hanna purporting that there was only one error. The year should be 2000 instead of 2003. The Judge never signed and filed the Order denying the Motion to Dismiss.

At the trial of November 30, 2006, Swanson appeared as substitute counsel for Thye. The case was nol prossed because the inspector no longer worked for the City. However, prior to the trial date, Taylor filed a Motion to Dismiss which the Judge refused to hear and rule on, and told Taylor she could bring that issue up when she was issued another summons for her yard.

For over 1 ½ years , Taylor was harassed to clean her yard of her personal property and was deprived of her liberty and property by the Defendant Assistant City Attorneys, even though the IPMC did not give them the authority. Additionally, to add insult to her injury, the notice of violation Taylor received deprived her of her Constitutional rights to due process of the law and equal protection.

MOTION TO DISMISS

Whether a public official is entitled to absolute immunity is a question of law that is reviewed de novo. *Botello v. Gammick*, 413 F.3d 971, 975 (9th Cir.2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1419, 164 L.Ed.2d 116 (2006).

It is well established that a state prosecuting attorney who acted within the scope of his duties in **initiating and pursuing** a criminal prosecution is immune from a civil suit for damages under § 1983. *Imbler*, 424 U.S. at 410; Such a prosecutor is not amenable to a suit for damages under § 1983. *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997). Acts undertaken by a prosecutor in preparing for the **initiation** of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) The Courts of Appeals are virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties. *Imbler*, 424 U.S. at 420

To decide whether absolute immunity applies, this Court must assume, without deciding, that Plaintiff has alleged a deprivation of a constitutional right under § 1983." *Genzler v. Longanbach*, 410 F.3d 630, 643-44 (9th Cir.2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 737, 163 L.Ed.2d 570 (2005) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 261, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)). Whether the alleged conduct is sufficient to state a claim for liability under § 1983 is therefore not before the Court at this time. *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007)

ARGUMENTS

1. Absolute immunity does not shield Defendants Todd, Thye and Swanson from this lawsuit.

Defendants, Todd, Thye and Swanson were prosecutors who represented the City of Columbia at the time of the events complained of. Absolute prosecutorial immunity is a complete bar to a suit for damages under 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13

(1976). This immunity applies to a prosecutor's role in initiating a prosecution and in presenting the government's case. Thus, prosecutors are absolutely immune for those activities "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. To apply this standard, the Court crafted a "functional approach" by which only the actions taken by the prosecutor "in **initiating and in presenting the State's case**" for trial are examined. The Court noted that not every activity of a prosecutor involves **initiating and presenting** a case. Thus, absolute immunity does not extend to aspects of a prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Id.* at 430-31 (emphasis added):

> "We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . .Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them."

In *Burns v. Reed*, 500 U.S. 478 (1991), the United States Supreme Court extended the doctrine of prosecutorial immunity to include some pre-trial activities. In that case, a prosecutor was accused of (1) eliciting false testimony in a probable cause hearing that led to the issuance of a search warrant, and (2) advising police on inappropriate methods of interrogating a suspect. The

doctrine was extended to include "any hearing before a tribunal which performed a judicial function." This included the presentation of testimony in support of an application for a search warrant. *Id.* at 490.

The court ruled that the prosecutor's actions of appearing before a judge in support of a motion clearly involved his role as an advocate, rather than his roles as administrator or investigative officer. The Court determined that the issuance of a warrant is unquestionably a judicial act. Further, that appearing at a probable-cause hearing is intimately associated with the judicial phase of the criminal process.

Burns did not extend the doctrine of absolute immunity to each aspect of a prosecutor's legal advice to police. The Supreme Court concluded that advising police in the investigative phase of a criminal case could be too far removed from the judicial process to warrant extending immunity on that basis. The Court rejected the argument that legal advice is categorically "of a judicial nature because the prosecutor is, like a judge, called upon to render opinions concerning the legality of conduct."

Because the immunity attaches to the official prosecutorial function, see, e.g., *Imbler*, 424 U.S. at 430, and because **the initiation** and pursuit of a criminal prosecution are quintessential prosecutorial functions, see id., the prosecutor has absolute immunity for the initiation and conduct of a prosecution "unless [he] proceeds in the clear absence of all jurisdiction," *Barr v. Abrams*, 810 F.2d 358, 361 (2d. Cir. 1987). A prosecutor engaging in "prosecutorial activities intimately associated with the judicial phase of the criminal process" loses "the absolute immunity he would otherwise enjoy" only if he "acts without any colorable claim of authority." id.

To qualify for absolute immunity, an action must be "closely associated with the judicial process." The Supreme Court refined the investigative/advocacy distinction in *Buckley v. Fitzsimmons*, 509 U.S.. 259 (1993). In that case, the plaintiff accused prosecutors of fabricating evidence during the preliminary investigation of a crime. Advising police on interrogation methods or "the existence of probable cause" does not qualify a prosecutor for absolute immunity. Thus, prosecutors involved in pretrial investigations are not entitled to absolute immunity.

Finally, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), a prosecutor was sued for her (1) preparation and filing of an information and motion for an arrest warrant, and (2) attestation to the truth of the facts contained in the accompanying affidavit. The Court found absolute immunity in the preparation and filing of an information and motion for arrest warrant. However, absolute immunity did not apply to the second charge. The court opined that the attesting to the accuracy of the facts in the affidavit, the prosecutor was acting as a complaining witness rather than a lawyer.

In *Kalina*, which is the Court's most recent decision on prosecutorial immunity, the court said the key was whether the task "involved the exercise of professional judgment," not merely the review of the "truth or falsity of the factual statements themselves."

There is no bright line between advocacy and investigation. *Mink v. Suthers*, Op. No. 04-0496, Ct.App., 10th Cir., (April 6, 2007). A prosecutor's courtroom conduct falls on the advocacy side of the line. *Buckley*, 509 U.S. at 274. It is equally clear that advocacy is not limited to filing criminal charges or arguing in the courtroom. *Id.* at 272. Thus, especially when considering pre-indictment acts, it is important to consider other factors, such as (1) whether the

action is closely associated with the judicial process, *Burns*, 500 U.S. at 495, (2) whether it is a uniquely prosecutorial function, *id.* at 491 n.7, and (3) whether it requires the exercise of professional judgment, *Kalina*, 522 U.S. at 130.

The Complaint in this case alleges causes of action for conspiracy, malicious prosecution, and the intentional infliction of emotional distress. These allegations allege Defendants, Todd, Thye and Swanson caused Plaintiff to be injured as a direct result of their acts and omissions. Conspiracy, malicious prosecution and the intentional infliction of emotional distress remove the protective shield of prosecutorial immunity for these Defendants. It cannot be argued that their responsibilities include acts and omissions giving rise to such causes of action.

Since the acts and omissions of these defendants for the three causes of action are outside the scope of their prosecutorial duties, the Defendants are not entitled to the protection of prosecutorial immunity. Absolute immunity does not extend to actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution. *See Imbler*, 424 U.S. at 430-31; *Burns*, 500 U.S. at 486, 493-94

In *Burns*, the court found that the prosecutor's role in reviewing and approving the affidavit was too far removed from the judicial process to entitle her with absolute immunity. Further, the review of the affidavit was not a uniquely prosecutorial role. The Supreme Court made it clear in *Burns* that a legal review for the sufficiency of evidence to support probable cause is not sufficient to confer absolute immunity.

Absolute immunity applies to the "prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns*, 500 U.S. at 494. In Burns, the prosecutor's function was not that of an advocate; her

function was to provide legal advice outside the courtroom to aid a nascent investigation. The premise of *Burns* was that, in providing advice to the police, the prosecutor acted to guide the police, not to prepare his own case. Thus, when determining whether absolute immunity applies, courts must examine "the nature of the function performed, not the identity of the actor who performed it." *Goldstein v. City of Long Beach*, 481 F3d. 1170 (9th cir. 2007). The Complaint in this case, on its face, passes the "function" test of no prosecutorial immunity.

Among the many instances in which prosecutorial immunity has not been found are advising police officers during the investigative phase of a criminal case, performing acts which are generally considered functions of the police, acting prior to having probable cause to arrest, or making statements to the public concerning criminal proceedings." *Botello v. Gammick,* 413 F.3d 971, 975 (9th Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 1419, 164 L.Ed.2d 116 (2006); conduct involving termination, demotion and treatment of employees." *Meek v. County of Riverside,* 183 F.3d 962, 967 (9th Cir.1999); a District Attorney's decisions to demote or fail to promote a deputy attorney, to reassign the deputy to a different department, or to bar the deputy from prosecuting any future murder cases. *Ceballos v. Garcetti,* 361 F.3d 1168, 1184 (9th Cir.2004), *rev'd on other grounds,* ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 2006).

In March, Plaintiff put the City on notice that the summons was constitutionally infirm, as it did not meet the requirements of the ordinance upon which it was based - the IMPC. Plaintiff informed McCall, a supervisor of inspectors, that the Summons was defective because of the omitted requirements. In May, when Plaintiff asked McCall for a copy of the 2003 IMPC, he refused to give it to her. The only reasonable explanation for his refusal was that he had discussed the problem with the City's

prosecutors and had been advised not to provide Plaintiff with a copy of the document. Providing McCall with such advice penetrates the shield of prosecutorial immunity. Conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. *Imbler*, supra.

The United States Supreme Court has been "quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). The Defendants bear the burden of demonstrating that absolute immunity is warranted. Defendants have failed to satisfy their burden. The motion to dismiss must be denied for all the aforementioned reasons.

2. **Absolute immunity does not apply to the Defendants who did not initiate a charge that is a strict liability offense under the IPMC without the mandated notice of violation (probable cause).**

Absolute immunity has been denied prosecutors for the administrative and investigative functions as well as for not having probable cause, and having no authority to be an advocate. **Buckley** defined the line of absolute immunity as having to have probable cause before absolute immunity applies.

An advocate is defined by Blacks Law Dictionary, Sixth Edition as: "One who assists, defends, or pleads for another. One who renders legal advice and aid and pleads the cause of another before a court or a tribunal, a counselor. A person learned in the law, and duly admitted to practice, who assists his client with advise and pleads for him in open court. An Assistant; adviser; a pleader of causes."

A prosecutor is defined by Blacks Law Dictionary, Sixth Edition as: "One who prosecutes another for a crime in the name of the government. One who instigates the prosecution upon which an accused is arrested, or who prefers an accusation against the party whom he suspects to be guilty, as does a district, county or state's attorney on the behalf of the state, or a United States Attorney for a federal district on behalf of the US government."

Taylor was not served with a proper notice of violation as mandated for a strict liability offense. (# 16 in the Amended Complaint, Exhibit #2 filed with the Original Complaint). The notice of violation in a strict liability offense is equivalent to probable cause in a warrant or indictment. Probable cause for violations of the IPMC could be established only after Taylor had been served with a notice of violation as mandated in section 107.2 of the IPMC and failed to comply with the notice. Hence, prior to becoming an advocate or prosecutor for the City under the IPMC, Defendants Todd, Thye and Swanson had a sworn and inherent duty to first determine that there was probable cause to pursue the charges in the Summons issued by Balzeigler. S.C. Code of Laws § 6-7-80 gives law enforcement officers and code enforcement officers the authority to issue a Uniform Ordinance Summons not prosecutors. Therefore, Defendants Todd, Thye and Swanson have **no authority to initiate** an action for violation of any City Ordinances.

In order to establish probable cause for violations of the IPMC, Defendants needed to determine if Taylor had been served a notice of violations that complied with all of the mandates of section 107.2. They would become an advocate or prosecutor for the City only after a determination that a proper notice of violation had been served on Taylor and then present evidence to the jury that Taylor failed, refused, or ignored the mandated notice of violation.

The notice of violations Taylor received does not have all of the requirements mandated in section 107.2 (# 16 in the Amended Complaint, Exhibit #2 filed with the Original Complaint). Therefore, the Defendants did not have probable cause to prosecute this case. The Defendants did not and cannot initiate a charge for violation of the IPMC. They are not entitled to absolute immunity. To have a constitutional right and to have the constitutional right taken away by absolute immunity is like having no rights at all and is reminiscent of slaves with their constitutional rights being denied.

Subsequently, the Defendant Assistant City Attorneys in this case are illegitimate prosecutors. They are neither advocate by definition nor by the IPMC law. They **can never initiate** a charge **nor** can they be an **advocate or prosecutor** for the City under the IPMC with a notice of violation that does not comport with its mandated notice requirements. They did not have authority to be an advocate because they can only be advocates or prosecutors for the City when the notice of violations is legally firm. "No Proper Notice, No Advocate for the City". Defendants have not proven that they have absolute immunity without the authority to initiate a charge under the IPMC and without probable cause. This court must deny the Defendants absolute immunity.

3. **This is a novel issue of law for denial of absolute immunity in the 21st century and these Defendants should be denied absolute immunity.**

All of the case law and the cases cited by these Defendants on absolute immunity in support of their motion involve cases where the prosecutor **initiated and presented** the cases in court, secured indictments from grand juries and/or followed through on arrest warrants

that had probable cause. The basis of which evolved from common law.

Taylor has been unable to find even one case where a City Attorney or an Assistant City Attorney(s), who does not have the authority to **initiate** a charge, has been granted absolute immunity where the offense is a "strict liability offense" that always has a constitutional notice requirement. Under stare decisis doctrine, the Defendants are not entitled to absolute immunity because there are no cases with similar issues or facts where the prosecutor had no authority to ever initiate a charge. The decision to initiate a prosecution is at the core of a prosecutor's judicial role. ***Imbler*** at 430-431

The concept of the International Property Maintenance Code evolved in 1999 as the brainchild of the International Code Council, Inc. (ICC). The intent of the IPMC is to govern existing buildings and structures. A violation of the IPMC is a strict liability offense and there is a constitutional notice requirement for strict liability offenses. The Notice of Violation in section 107.2 of the 2000 IPMC has five mandated items that must be included. Failure to comply with a properly written notice is equivalent to not having probable cause. A code enforcement officer can legally issue a Uniform Ordinance Summons only after a proper notice of violation has been served. The law to be given to a jury will have to include a statement that says: Taylor is guilty as charged if she did not comply with the notice of violation served in accordance with section 107 of the IPMC. Otherwise you must find her innocent.

S. C. Code section 6-9-60 gives governmental entities the authority to voluntarily adopt the IPMC. The purpose and original intent of 1983 Civil Rights Act is to control arbitrary and capricious behavior of persons acting under the disguise of the law. The IPMC does not give anyone in

the City, or elsewhere, the authority to enforce violations of the code without having first served a notice of violations as mandated in section 107.2. These Defendants were not advocates or prosecutors of the IPMC under facts in this case. They did not act within the scope of their duties and the authority of the IPMC. These Defendants' conduct was arbitrary and capricious.. These Defendants are not entitled to absolute immunity.

To grant absolute immunity to these Defendants where the charge is for a strict liability offense for violation of amunicipal ordinance that has a mandated constitutional notice requirement in essence allows the City to completely disregard the Constitution of the United States and to succeed from the Union, once again. The 14th Amendment to the Constitution guarantees due process and equal protection of the laws. At the same time, absolute immunity for these Defendants guarantees no due process and no equal protection for citizens under the U.S. Constitution.

Therefore absolute immunity is not applicable to this casejust because they call themselves prosecutors. The Defendants refusal to voluntarily dismiss the charges for lack of a proper notice of violation under the IPMC indicates there is a policy and/or custom to intentionally violate Constitutional rights of citizens because of their inability to initiate charges. Defendants have not shown that they are entitled to absolute immunity the Defendants Todd, Thye, and Swanson's Motion to Dismiss must be denied because they are not entitled to absolute immunity.

4. ***The Plaintiff's 42 U.S.C. 1983 actions against these Defendants in their official capacities should be dismissed as redundant to the 42 U.S.C. 1983 actions against the City of Columbia.***

Plaintiff does not object to the dismissal of Defendants Todd, Thye, and Swanson on in their official capacity from the 42 U.S.C. 1983 actions on the grounds of redundancy.

Plaintiff objects to the dismissal of Defendants Todd, Thye, and Swanson on grounds of redundancy from all other actions in their official capacities. Brandon v. Holt cited by Defendants is not applicable to these claims, is faulty, and has no similarity. Brandon centers around Rule 15(b) for amending the Complaint to conform to the evidence presented at trial. In this case the Defendants Todd, Thye, and Swanson are necessary parties in their official capacities for injunctive relief against the City of Columbia, the 42 U.S.C. 1985 conspiracy claim, intentional infliction of emotional distress, and malicious prosecution.

CONCLUSION

This objection is supported by the pleadings and the Exhibits 1-22 filed with the Original Complaint, the applicable law, this memorandum of law and other material that Plaintiff may submit to the Court before or at the hearing on the Motion to Dismiss.

This case centers on very basic law. The word "shall" is mandatory therefore the notice of violation as mandated in section 107.2 of the IPMC must have all five of the items. The notice of violation in a strict liability offense is the law of the case. The Defendants have no authority to issue a Uniform Ordinance Summons which initiates the charge. Therefore, they have a heightened duty to determine if the notice of violation is adequate to allow them to become prosecutors. Defendants have not met their burden. They are not entitled to absolute immunity under the facts of this case, the International Property Maintenance Code, case law, and common law.

WHEREFORE, Plaintiff respectfully requests that the Court issue an Order denying the Defendants Todd , Thye, and Swanson's Motion to Dismiss all actions except the ones that are not objected to.

Respectfully submitted by:

September 6, 2007

/s/Carolyn Yvonne Murphy Taylor
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Plaintiff *Pro Se*

Case: 3:07-cv-00983-JFA-JRM Document #:55 Date Filed: 01/22/08

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 3:07-983-JFA-JRM

Carolyn Yvonne Murphy Taylor, Plaintiff, v. City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Walter Todd, Esq., Assistant City Attorney, Columbia, S.C; Dana M. Thye, Esq., Assistant City Attorney Columbia, S.C; Hunter P. Swanson, Esq., Assistant City Attorney, Columbia, S.C; Donnie Balzeigler, Code Enforcement Office) Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity, Defendants.	**SUPPLEMENTAL MEMORANDUM IN OBJECTION TO THE MOTION TO DISMISS DEFENDANTS TODD, THYE AND SWANSON**

TO: THE HONORABLE U.S. MAGISTRATE JUDGE JOSEPH R. McCROREY AND DEFENDANTS TODD, THYE, AND SWANSON

INTRODUCTION

The Motion to Dismiss Defendants Todd, Thye and Swanson filed on August 2, 2007 was heard at a hearing on January 11, 2008 before the Honorable U.S. Magistrate Joseph R. McCrorey. At the hearing Plaintiff presented an additional argument in objection to the Motion to Dismiss that she discovered the morning of the hearing and

requested time to brief her argument. Judge McCrorey granted the request and gave Plaintiff until January 22, 2008 to file her supplemental arguments. Plaintiff submits these arguments without abandoning arguments #1, #2 and #3 already filed in the Memorandum In Objection to Dismiss Defendants Todd, Thye, and Swanson and presented at the hearing. However, Plaintiff withdraws her 4th argument.

ARGUMENTS

1. THE PROSECUTORS ARE NOT ENTITLED TO ABSOLUTE BECAUSE THE CONSTITUTIONAL VIOLATION OCCURRED BEFORE THE CASE BEGAN AND WAS COMMITTED BY THE CODE ENFORCEMENT.

All of the case law focuses on actions, behaviors, functions, and roles of the prosecutor himself who initiated the charge and presented the case in court. The case at hand takes a different spin in that **the constitutional violation occurred before the case began and was committed by the code enforcement officer**, not the prosecutor(s), and the case was initiated by the code enforcement officer through the Uniform Ordinance Summons. In fact the code enforcement was the only one who could issue the notice of violation which is a constitutional right guaranteed to the Plaintiff by the 14th Amendment to the United States Constitution, and is discussed below. Additionally, Defendants stated in their Memorandum footnote 2 that "S.C. Code Ann. Section 56-7-80 authorizes a municipality to use an ordinance summons to bring charges for violations of municipal ordinances. They may be served by a law enforcement officer or code enforcement but may not be used to perform custodial arrests." Therefore, the Defendants could never bring charges against the Plaintiff to initiate a case nor issue a notice of violation.

The court has found that administrative and investigate actions of a prosecutor are exempt from absolute immunity and are entitled only to qualified immunity. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). The Courts have analyzed that Prosecutors are not given absolute immunity in administrative and investigative roles because they are not advocates in court when the violations occurred.

The 2000 International Property Maintenance Code ("IPMC") requires a code enforcement officer to issue a notice of violation. Section 104.6 – Notices and Orders states: "The code official **shall issue all necessary notices** or orders to ensure compliance with this code." (Emphasis added) The 2000 International Property Maintenance is attached as Exhibit 5 to the Original Complaint and is incorporated herein by reference.

IPMC Section 106.2 - Notice of violation states: "The code official shall serve a notice of violation or order in accordance with Section 107."

IPMC Section 107.1 - Notice to owner or to person or persons responsible states: "Whenever the code official determines that there has been a violation of this code or has grounds to believe that a violation has occurred, notice shall be given to the owner or the person or persons responsible therefore in the manner prescribed in Sections 107.2 and 107.3. Notice for condemnation procedures shall comply with section 108.3."

It is mandatory that Plaintiff receives a notice of violation that complies with IPMC Section 107.2. Section 107.2 - Form states: "Such notice prescribed in Section 107.1 shall be in accordance with all of the following:

1. Be in writing.
2. Include a description of the real estate sufficient for identification.

3. Include a statement of the violation and why the notice is being issued.
4. Include a correction order allowing a reasonable time to make repairs and improvements required to bring the dwelling unit or structure into compliance with provisions of this code.
5. Inform the property owner of the right to appeal.

On December 11, 2004, Plaintiff received a Warning Notice of Violation from Inspector Donnie Balzeigler dated December 9, 2004 as stated in paragraph #16 of the Amended Complaint and attached as Exhibit 2 to the Original Complaint. The Warning Notice of Violation is incorporated herein by reference. Violations of the IPMC are not cited in this notice as required in the International Property Maintenance Code. It does not include numbers 3, 4, and 5 of IPMC Section 107.2 as stated above. However, the notice clearly cites violations of the City's Municipal Code, Sections 8-31, 8-32, 8-33, 8-34, 8-35, 8-301, 8-302, 8-303, 8-304, and 8-305.

The notice of violation is a clearly established constitutional right of Plaintiff that was violated on December 9, 2004 before the case began. The case began on March 11, 2005 when the Plaintiff was charged with violating the 2000 International Property Maintenance Code. A copy of the Uniform Ordinance Summons is attached as Exhibit 1 to the Original Complaint and is incorporated herein.

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) was a case on appeal from the Court of Appeals of the Seventh Circuit that the prosecutors had absolute immunity from fabricated evidence claim and statements made at a press conference claim. Buckley v. Fitzsimmons, 919 F.2d 1230 (1990) "In the Court of Appeals' view, "damages remedies are unnecessary," id., at 1240, when" courts can curtail the

costs of prosecutorial blunders . . . by cutting short the prosecution or mitigating its effects," id., at 1241 Thus when "out-of-court acts cause injury only to the extend a case proceeds" in court, id., at 1242, the prosecutor is entitled to absolute immunity and "the defendant must look to the court in which the case pends to protect his interests, id., at 1241. By contrast, **if "a constitutional wrong is complete before the case begins," the prosecutor is entitled only to qualified immunity**. Id., at 1241-1242. Applying this unprecedented theory to petitioner's allegations, the Court of Appeals concluded that neither the press conference nor the fabricated evidence caused any constitutional injury independent of the indictment and the trial, Id., at 1243, 1244." The Supreme Court reversed the Court of Appeals an opined that: prosecutors are not absolutely immune from 42 U.S. 1983 damages claims alleging (1) fabrication of evidence during preliminary investigation when giving advice to police, and (2) making a false statements at a press conference. Buckley v. Fitzsimmons, 509 U.S. 259. (Emphasis added)

42 U.S.C. 1983 subjects to liability "every person" who, acting under color of state law, commits the prohibited act. The original, injury focused theory of absolute immunity and the Court of Appeals theory in Buckley that if "a constitutional wrong is complete before the case begins," the prosecutor is entitled only to qualified immunity." must be applied to the case at bar.

The threshold constitutional issue in this case is the Warning Notice of Violation Plaintiff received before being issued the Uniform Ordinance Summons which gave the Municipal Court personal jurisdiction of Taylor.

The Notice of Violation is a question of law which is determined by the Court. On March 10, 2006 Judge Hanna ruled in open Court on the Plaintiff's Motion to Dismiss because the notice of violation Plaintiff received did not met

the requirements of section 107.2 of the 2000 International Property Maintenance Code. Judge Marian Hanna denied Plaintiff's' Motion to Dismiss and instructed Prosecutor Dana M. Thye to prepare an Order. Thye submitted a Proposed Order to Judge Hanna on May 1, 2006. Plaintiff objected to the Proposed Order on numerous grounds on May 3, 2006. Thye submitted a revised Proposed Order with one correction on May 8, 2006. Exhibits #12, #15, #16, #17, and #18 attached to the Original Complaint are incorporated herein by reference.

The Plaintiff has not received a written, signed and filed Order from Judge Hanna on the motion. Subsequently, Plaintiff does not have an effective Order because Judge Hanna has not officially ruled on the motion and the record below is completely void of an Order signed by Judge Hanna and filed with the Municipal Court. Defendants' argument is Judge Hanna's ruling in open Court is final/effective. However, this reasoning is flawed and fatal. An order is made effective only if it signed by the judge and filed, or if it is entered in writing by the clerk. 56 Am Jur 2d section 35. The Warning Notice of Violation, the constitutional violation, is prima facia invalid and an effective Order does not exist.

Furthermore, the intent of the IPMC is stated in Section 101.3: "This code shall be construed to secure its expressed intent, which is to ensure public health, safety and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises. Existing structures and premises that do not comply with these provisions shall be altered or repaired to provide a minimum level of health and safety as required herein." Plaintiff's charges do not comply with the expressed intent of the code.

Absolute Immunity applies to prosecutors for prosecutorial functions. 63A Am Jur 2nd. Prosecuting

Attorneys sec. 4. Defendants argue that they were in the courtroom as prosecutors and are absolute immune from any liability. Imbler v. Pachtman, 424 U.S. 409 (1976) reasoned that a prosecutor has absolute immunity when performing prosecutorial functions. The Notice of Violation is not a prosecutorial function and is the Plaintiff's constitutional protected right. The issuance of the Warning Notice of Violation before the case begins by the code enforcement is not intimately associated with the judicial phase of the criminal process.

The prosecutors are entitled to qualified immunity for investigations they perform prior to the beginning of the case. The court reasoned that police officers were entitled only to qualified immunity for doing investigative work and why should prosecutors have more immunity for performing the same actions as policemen.

The case at hand is a perfect example of the Defendants being entitled only to qualified immunity because the constitutional wrong was completed before the case began and was committed by the code enforcement as discussed above. This Honorable Court must deny the Motion to Dismiss by the Defendants Todd, Thye, and Swanson.

1. **THE PLAINTIFF'S ACTIONS AGAINST THESE DEFENDANTS IN THEIR OFFICIAL CAPACITIES SHOULD NOT BE DISMISSED AS REDUNDANT TO THE ACTION AGAINST THE CITY OF COLUMBIA.**

The Plaintiff withdraws her 4th argument submitted in the Memorandum in Objection to the Motion to Dismiss by Defendants Todd, Thye, and Swanson and submits the argument that follows.

Plaintiff objects to the dismissal of Defendants Todd, Thye, and Swanson on the grounds of redundancy from all actions in their official capacities. These Defendants are necessary parties in their official capacities for all 7 claims. Brandon v. Holt, 469 U.S. 464 (1985) cited by Defendants does not support their redundancy argument, is not applicable to this case, has no similarity to this case and is faulty. Brandon held that "a judgment against a public servant in his official capacity imposes liability on the entity he represents, provided the public entity received notice and an opportunity to respond; ..." and centers around Rule 15(b) for amending the Complaint to conform to the evidence presented at trial to include the judgment against a policeman in his official capacity when the municipality was not named as a defendant. Unlike Brandon these Defendants have been named in their official capacities and the City of Columbia is a defendant. 42 U.S.C. 1983 subjects to liability "every person" who, acting under color of state law, commits the prohibited act. The Defendants were acting under the City of Columbia's ordinance as employees which automatically puts them in official capacities. The official capacity of the Defendants only makes the City of Columbia liable for their employees actions and is not redundant.

For these reasons, the Defendants cannot be dismissed in their official capacities as redundant to the action against the City of Columbia.

CONCLUSION

Sound public policy and the law mandates that the actions of the prosecutors of the International Property Maintenance Code in this case are entitled to qualified immunity only. Prosecutors must be responsible and accountable for their actions. In the case at hand the code enforcement officer is the only one who issued the notice of violation and is only entitled to qualified immunity. The

notice of violation is the Plaintiff's constitutional right and was violated before the case began. The Defendants have no power to ever issue the notice of violation and are not entitled to absolute immunity. Why should the prosecutor(s) have more immunity than the code official for a constitutional wrong that occurred before the case began?

This objection is supported by the pleadings and the Exhibits 1-22 filed with the Original Complaint, the applicable law, this Supplemental Memorandum and Memorandum in Objection to the Motion to Dismiss by the Defendants Todd, Thye and Swanson, and the arguments presented at the hearing on the Motion to Dismiss.

WHEREFORE, Plaintiff respectively requests that the Honorable Court issue an Order denying the Motion to Dismiss by the Defendants Todd, Thye, and Swanson on all actions.

Respectfully submitted by:

January 22, 2008

/s/Carolyn Yvonne Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
(803) 309-0487

Plaintiff *Pro Se*

Case: 08-1372 Document: 8 Date Filed: 04/25/2008

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INFORMAL BRIEF

N0. 08-1372,

Carolyn Taylor v. City of Columbia, et al
3:07-cv-00983-JFA-JRM

1. **Jurisdiction (for appellants/petitioners only)**

   A. Name of court or agency from which review is sought: United States District Court For the District of South Carolina, Columbia Division

   B. Date(s) of order or orders for which review is sought:

   Order filed February 29, 2008 by the U.S. District Judge (Doc. 72-1)

2. **Timelines of notice of appeal or petition for review (for prisoners only)**

   Exact date on which notice of appeal or petition for review was placed in institution's internal mailing system for mailing to court:

Issue 1. **Did the U.S. District Judge err in adopting the U.S Magistrate Judge's Report and Recommendation togrant absolute immunity to the Municipal Prosecutors in their individual capacities?**

Supporting Facts and Argument.

The U.S. District Judge erred in adopting the U.S. Magistrate Judge's Report and Recommendation to grant absolute immunity to the Municipal Prosecutors in their individual capacities.

The Appellant was charged with violating the International Property Maintenance Code ordinance (IPMC). (Doc. Exhibits 1-2 p. 3) The Municipal prosecutors are not entitled to absolute immunity. In order to be entitled to absolute immunity in this case, the Municipal prosecutors had to have a notice of violation that complied with the requirements of section 107.2 of the IPMC ordinance in order to be acting within the scope of their duties of the IPMC ordinance.

Under section 106.3 (Prosecution of violation) of the IPMC ordinance, the element of proof needed to prosecute the Appellant for violating the IPMC ordinance is a notice of violation that complied with section 107. (Doc. 1-2 Exhibits p. 15 § 106 & 107) The notice of violation is the basic the law of the case. The notice of violation is the constitutional right guaranteed under the 14th Amendment.

The cloak of absolute immunity never attached to the Municipal prosecutors because they were not acting in Municipal Court under the authority of the IPMC ordinance. The Municipal prosecutors did not have a notice of violation with all of the requirements in section 107.2 of the IPMC ordinance issued to the Appellant by the code enforcement officer before the case began.

The intent of the IPMC ordinance is to govern existing structures. (Doc. 1-2 Exhibits p.13 §101.3) The Warning Notice of Violation, that the Appellant received, was for violations in Chapter 8 of the City Ordinances sections 8-31, 8-33, 8-34, 8-35, 8-301, 8-302, 8-303, 8-304 and 8-305. (Doc. 1-2, Exhibits p. 133)

The Warning Notice of Violation, Appellant received, did not have § 107.2 (3), § 107.2 (4) and § 107.2 (5) of the mandated requirements of the IPMC ordinance. Strict compliance with section 107.2 requirements for the notice of violation is mandatory. The notice of violation was inadequate. (Doc. 1-2, Exhibits p. 133) Appellant's constitutional right to due process of the law has been violated. The Municipal prosecutors were not acting within the scope of duties of the International Property Maintenance Code ordinance. The Municipal prosecutors are entitled only to qualified immunity.

There is a clear distinction between a Municipal prosecutor acting within the scope of his duties of the IPMC ordinance and a Municipal prosecutor not acting within the scope of his duties of the IPMC ordinance. The Municipal prosecutor acting within the scope of his duties of the IPMC ordinance is entitled to absolute immunity. The Municipal prosecutor not acting within the scope of his duties under the IPMC ordinance is entitled only to qualified immunity.

The entire record is completely void of these Municipal prosecutors having a notice of violation issued to the Appellant that comports with all of the requirements of section 107.2. Subsequently the Municipal prosecutors did not meet the burden of proof that they were acting within the scope of duties of the IPMC ordinance.

The Appellant's due process rights were violated as discussed above. The Municipal prosecutors were not acting within the scope of duties of the IPMC ordinance because they did not have a proper notice of violation. They are not entitled to absolute immunity. Consequently, the U.S. District Judge erred in accepting the Recommendation to grant absolute immunity to the Municipal prosecutors in their individual capacities. The order must be reversed.

A. The U.S. District Judge erred in adopting the Report and Recommendation because the authorities citied do not support granting absolute immunity to the Municipal Prosecutors in their individual capacities.

As discussed in Issue 1 above, and incorporated herein by reference, The Municipal Prosecutors were never acting within the scope of duties of the International Property Maintenance Code Ordinance because Appellant had not been issued an adequate notice of violation that contained all requirements of section 107.2 of the IPMC ordinance. Strict compliance of section 107.2 is mandatory. The Appellant's fundamental right to due process of law was violated. The Municipal prosecutors are not entitled to absolute immunity in their individual capacities.

The Report and Recommendation cites Imbler v. Pachtman, 424 U.S. 409 (1976) and Ostrzenski v. Seigel, 177 F.3d 245, 249 (4th Cir. 1999) quoting Imbler as authorities to support giving the Municipal prosecutors absolute immunity in their individual capacities. Reliance on these cases is misplaced. The Magistrate Judge erred in his application of the authorities cited to support absolute immunity for the Municipal Prosecutors since the facts are misinterpreted

Imbler found that state prosecutors, when acting within the scope of their prosecutorial duties are entitled to absolute immunity for claims under 42 U.S.C. 1983. As discussed above, the Municipal prosecutors were not acting within the scope of duties of the IPMC ordinance. Therefore, the Municipal prosecutors are not entitled to absolute immunity in their individual capacities.

The Report and Recommendation also found that: "The undersigned concludes that the defendants are entitled to absolute immunity. All of the alleged actions

took place after Taylor had been noticed for the violations and involved their role in the judicial process. This would include Thye's efforts to obtain evidence after the violation notice had been served. Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994) ("Preparation, both for the initiation of the criminal process and for trial, may require obtaining, reviewing, and evaluating evidence.")."

Thye's efforts to obtain evidence, after the case had begun, are not within the scope of duties under the IPMC. At the hearing on January 13, 2006, Thye argued that section 104.4 of the IPMC ordinance gave authority to look in the Appellant's backyard to see if she had removed the items or just moved them to another place. (Doc. 1-2 Exhibits pp. 51-57) Section 104.4 is taken out of context.

Section 104 addresses the duties and powers of the code enforcement officer before the Appellant is charged with violating the IPMC. Section 104.4 gives the code enforcement officer the right of entry to inspect to see if there is a violation of the IPMC ordinance. It does not give a right of entry after Appellant was charged with violating the IPMC ordinance. (Doc. 1-2 Exhibits p. 14)

To get evidence in January 2006 for a violation of the IPMC ordinance that occurred on March 11, 2005 is not within the scope of duties of Municipal Prosecutor Thye under the IPMC ordinance. Additionally, to prosecute Appellant for personal property stored in her yard is not within the scope of duties under the IPMC ordinance. The expressed intent of the IPMC ordinance is to govern existing structures. (Doc. 1-2 Exhibits p. 13 § 101.3)

All of the Municipal prosecutors were never acting under the duties of the IPMC ordinance because they did not have a proper notice of violation. The Appellant's due process rights were violated as discussed above. They are not entitled to absolute immunity. Consequently, the U.S. District Judge erred in accepting the Recommendation to

grant absolute immunity to the Municipal prosecutors in their individual capacities. The order must be reversed.

B. The U.S. District Judge erred in adopting the Report and Recommendation because the Rationale did not have a logical nexus with the evidence for rejecting the standard: "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity".

As discussed in Issue 1 above, and incorporated herein by reference, The Municipal Prosecutors were never acting within the scope of duties of the International Property Maintenance Code ordinance because Appellant had not been issued an adequate notice of violation that contained all requirements of section 107.2 of the IPMC ordinance. Strict compliance of section 107.2 is mandatory. The Appellant's fundamental right to due process of law was violated before the case began. The Municipal prosecutors are not entitled to absolute immunity in their individual capacities.

The Report and Recommendation accepts the standard, "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity", quoted in Buckley v. Fitzsimmons, 509 U.S. 259 (1993) that was used by the court in Buckley v. Fitzsimmons, 919 F.2d 1230, 1241-1242 (7th Cir. 1990). Then rationalizes that: "The problem with Taylor's argument is that she alleges no involvement by these defendants prior to receiving notice from Balzeigler. She makes no argument that the defendants were involved in, or had knowledge of, the investigation which led to the issuance of the violation." (Doc. 60 p.4)

This rationale is flawed and clear error. It is undisputed that the constitutional wrong was completed

before the case began. However, the U.S. Magistrate Judge goes beyond the plain and unambiguous language of the standard. The standard does not qualify who must commit the constitutional wrong before the case begins.

There is no logical nexus between the constitutional wrong being committed before the case begins and Municipals prosecutors being involved or knowing of the investigation before the case began. Additionally, the Report and Recommendation has failed to cite any legal authority or precedent to support this conclusion. The Municipal prosecutors are entitled to only qualified immunity.

None of the Municipal prosecutors were ever acting under the duties of the IPMC ordinance because they did not have a proper notice of violation. The Appellant's due process rights were violated before the case began by the code enforcement officer. They are not entitled to absolute immunity. Consequently, the U.S. District Judge erred in accepting the Recommendation to grant absolute immunity to the Municipal prosecutors in their individual capacities. The order must be reversed.

Issue 2.. <u>Are Municipal Prosecutors for violation of the International Property Maintenance Code ordinance not being entitled to absolute immunity a Novel issue of law for the 21st Century?</u>

Supporting Facts and Argument.

Municipal Prosecutors for violation of the International Property Maintenance Code Ordinance not being entitled to absolute immunity is a novel issue of law for the 21st Century.

When 42 U.S.C. 1983 was passed, the wording did not exclude anyone from being liable for damages for

constitutional violations. However, the U.S. Supreme Court ruled that under common law, prosecutors are entitled to absolute immunity. All of the caselaw on absolute immunity is for state level prosecutors who initiate the charge and prosecute the case. The reason that state level prosecutors were given absolute immunity is to not hamper the judicial process.

The elements of proof of a crime for state level prosecutors are greater than the elements of proof for violation of the IPMC ordinance for Municipal prosecutors because mens rea is not an element of proof for the Municipal prosecutors. The basic element of proof for violation of the IPMC ordinance for these Municipal prosecutors is the notice of violation which gives fair notice to the Appellant.

The U.S. Supreme Court also ruled that state level prosecutors are entitled only to qualified immunity for their investigative and administrative actions. The reason being that the actions of the state prosecutor occurred before the case began.

In the current case, the Appellant was served a Uniform Ordinance Summons for violation of the International Property Maintenance Code (IPMC) ordinance March 11, 2005 by the code enforcement officer and requested a jury trial. (Doc. 1-2 Exhibits p. 3) The Appellant was issued a Warning Notice of Violation dated December 9, 2004. The Warning Notice of Violation did not give proper notice for violations of the IPMC. It did no not contain § 107.2 (3), § 107.2 (4) and § 107.2 (5) of the IPMC ordinance. (Doc. 1-2 Exhibits p. 133)

In this case, the Municipal prosecutors take a different spin than state prosecutors. Under South Carolina Code of Laws, the Municipal prosecutors can never initiate a charge because a code enforcement officer and a

policeman are the only ones authorized to serve a Uniform Ordinance Summons, which gives the Municipal Court personal jurisdiction. The Municipal prosecutors can only become involved in a case for violation of the IPMC if the person who received a Uniform Ordinance Summons for violation of the IPMC requests a jury trial. Otherwise the alleged violator has a bench trial before a Municipal Judge.

The IPMC ordinance has a mandated notice of violation for a dwelling unit or structure, which can only be issued by code enforcement officer. The notice of violation must be issued before the Uniform Ordinance Summons can be served. The mandated Notice of Violation is the Constitutional guarantee of due process of law. It also is the primary element of proof of the crime for violation of the IPMC ordinance. A violation of the IPMC ordinance is a misdemeanor that is a strict liability offence. A person is found guilty if s/he did not comply with the notice of violation to bring the dwelling unit or structure up to the IPMC ordinance standard. (Doc. 1-2 Exhibits p. 15 § 106.3)

Before the prosecution begins, the mandated notice of violation is a well established constitutional due process right. The notice of violation requirements must be adhered to because due process of law requires fair notice be given for a violation of the IPMC ordinance. The Municipal prosecutors have a legal duty to protect Appellant's constitutional rights and to ensure that the Appellant's constitutional right to due process of the law has not been violated. The notice of violation was inadequate and deprived Appellant of her constitutional due process rights.

In this case, the Appellant did not receive the mandated notice of violation for the IPMC ordinance. (Doc. 1-2 Exhibits p. 15 § 107.2) Instead, on December 9, 2005 she was issued a Warning Notice of Violation under a different municipal ordinance. (Doc. 1-2 p. 133) She was served a Uniform Ordinance Summons for violation of the

IPMC on March 11, 2005 (Doc. 1-2 p. 3) and requested a jury trial on April 11. 2005.

The Municipal Prosecutors were not acting within the scope of authority of the IPMC because the mandated notice of violation was never issued by the code enforcement officer before the case began. The Municipal prosecutors totally disregarded the notice of violation requirements, procedural due process of law and the element of proof for violation of the IPMC ordinance. Appellant has a fundamental right to due process of the law. Appellant was deprived of her constitutional right under the Due Process clauses of the Federal and State constitutions.

Appellant has been unable to find case law or authority for a Municipal prosecutor who can never initiate a charge; who can never issue a notice of violation which is the primary element of proof and the constitutional guarantee of due process of law; and where the constitutional violation occurred before the case began by a code enforcement officer not the Municipal prosecutor. Under the stare decisis doctrine, the Municipal prosecutors are not entitled to absolute immunity because there are no cases with similar issues or facts.

Additionally, the Municipal prosecutors were not acting within the scope of authority of IPMC. The scope of authority for violations of the IPMC requires a notice of violation for the dwelling unit or structure. The Municipal prosecutors are not entitled to absolute immunity.

Appellant's constitutional right to due process of law has been violated. Public policy demands that all constitutional rights of all citizens are protected and respected all the time by Municipal prosecutors. Therefore, the Municipal prosecutors are entitled only to qualified immunity. The Report and Recommendation did not

consider this argument and erred. Surely, this is a novel issue of law for the 21st Century.

Issue 3. Did the U.S. District Judge err in reversing The U.S. Magistrate Judge's Recommendation to not dismiss the Municipal Prosecutors in their official capacities?

Supporting Facts and Argument.

The U.S. District Judge erred in reversing the U.S. Magistrate Judge's Recommendation of not dismissing the Municipal Prosecutors in their official capacities.

The District Judge cites Kentucky v. Graham, 473 U.S. 159, (1985) as on of the authorities to give a blanket dismissal to all of the Federal claims in Appellant's Amended Complaint against the Municipal prosecutors in their official capacities. Reliance on Kentucky v. Graham to dismiss the Municipal Prosecutors in their official capacities under 42 U.S.C. 1983 and 42 U.S.C. 19835 claims is misplaced.

Kentucky v. Graham is a case that determined that a government entity is not responsible for attorney's fees under 42 U.S.C. 1988 when an employee is sued in his personal capacity only. If an employee is sued in his official capacity, then the government entity is liable for attorney's fees under 42 U.S.C. 1988.

The Order quoted from Kentucky that: "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." This quote is taken out of context and does not justify dismissing the Municipal prosecutors in their official capacities on the grounds of redundancy. "To be **treated as** a suit against

the entity" does not equate to being **redundant** to the City for a suit against the Municipal prosecutors in their official capacities.

Kentucky also found that local government may not be sued under 42 U.S.C. 1983 for injury inflicted by its employees or agents. Since City of Columbia cannot be sued for injury inflicted by Municipal prosecutors under 42 U.S.C. 1983. Then a suit against the City and the Municipal prosecutors in their official capacities is not redundant and/or the same. The U. S. District Judge erred and the Order must be reversed for the claims under 42 U.S.C. 1983.

The Order does not cite any authority for dismissing the conspiracy claim under 42 U.S.C. 1983 against the Municipals prosecutors on the grounds of redundancy. This is plain error. The Order must be reversed for the claim under 42 U.S.C. 1985.

Additionally, the Order states: "In the response, plaintiff indicated that she did not object to dismissal of the defendants in their official capacities from the § 1983 claims of redundancy." (Doc. 72-1 p. 2) However, in the Plaintiff's Supplemental Motion in Objection to the Motion Dismiss, (Doc. 55 p.7) she withdrew her original #4 argument in the Memorandum in Opposition to the Motion (Doc.33 p.16) where she did not object to objecting to dismissing the Municipal prosecutors in their official capacities. The Order must be reversed for the claims under 42 U.S.C. 1983.

The plaintiff seeks injunctive relief from the Municipal prosecutors. The Municipal prosecutors are necessary parties for injunctive relief in their official capacities. They cannot be dismissed in their official capacities.

For the reasons discussed above, the U.S. District Judge erred in not accepting the Recommendation to not grant absolute immunity to the Municipal prosecutors in their official capacities. The order must be reversed.

4. **Relief Requested**

Identify the precise action you want the Court of Appeals to take:

Appellant respectively request this Honorable Court to reverse the Order of the United States District Judge by not granting the Municipal Prosecutors absolute immunity in their individual capacities, and/or by not dismissing the Municipal Prosecutors in their official capacities.

5. Prior appeals (for appellants/petitioners only)

A. Have you filed other cases in this Court? Yes [ ]No [X]

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

April 25, 2008 /s/ Carolyn Yvonne Murphy Taylor

Case: 08-137 Document: 16 Date Filed: 06/13/2008

08-1372

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Carolyn Yvonne Murphy Taylor, Plaintiff - Appellant,

v.

Walter Todd, Esq., in his official capacity as Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity: Hunter P. Swanson, Esq. in her official capacity as Assistant City Attorney and her individual capacity,

Defendants – Appellees,

and

City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity,

Defendants.

INFORMAL REPLY BRIEF

The *Pro Se* Appellant, Carolyn Yvonne Murphy Taylor, filed her Informal Opening Brief on April 25, 2008. The Appellees, Todd, Thye and Swanson, filed their Informal Response Brief on May 12, 2008. Taylor submits this Informal Reply Brief pursuant to the Informal Briefing Order filed April 1, 2008 to address the Appellees' arguments in the Informal Response Brief without abandoning arguments in her Informal Opening Brief.

ISSUE 1: Did the U.S. District Judge err in adopting the U.S. Magistrate Judge's Report and Recommendation to grant absolute immunity to the Municipal Prosecutors in their individual capacities?

Argument

Appellees' Informal Response Brief argues that the District Court Judge should have taken a functional analysis approach to adopt the Magistrate Judge's Report and Recommendation to grant absolute immunity to the Municipal prosecutors in their individual capacities. Appellees content that they were performing prosecutorial duties. However, the Appellees overlook, misinterpret, and misrepresent the fact that the state prosecutors in Imbler v. Pachman had to have probable cause before ascertaining whether the prosecutors were entitled to absolute immunity. Additionally, State prosecutors must be acting within the scope of their official duties to be entitled to absolute immunity.

The provisions for protecting rights of citizens and criminals under the U. S. Constitution and the S.C. Laws must be strictly pursued by these Municipal prosecutors. The Municipal prosecutors have a legal duty and an inherent duty to protect Taylor's constitutional rights.

In order to sustain a conviction for violation of the International Property Maintenance Code (IPMC) there must be evidence that Taylor received the mandated notice of violation and did not comply with the notice of violation beyond a reasonable doubt.

The Notice of Violation is the only evidence in this case that can create a legal presumption that Taylor violated the International Property Maintenance Code ordinance so that the Municipal prosecutors will have probable cause to continue prosecuting Taylor. For over 1 ½ years Taylor appeared in the Municipal Court for a jury trial. This legal presumption of a proper Notice of Violation has not been established in the Report and Recommendation or the Appellees' Informal Response Brief that all of the elements required by § 107.2 of the IPMC ordinance are in the Warning Notice of Violation Taylor received.

There is more to being a prosecutor than appearing in the courtroom as a prosecutor. A prosecutor must be acting within his official duties of being an advocate for pursuing a violation of the IMPC. His official duties for prosecuting a violation of the IPMC must come from the ordinance itself. Nothing in the record shows that the prosecutors took into consideration the compliance requirement of the notice of violation. A proper notice of violation is a constitutional right guaranteed under the 14th Amendment.

The standard for a state prosecutor is that there must be probable cause. The standard for a municipal prosecutor of the IPMC is there must be a proper notice of violation because the innocence or guilt is determined from it. Prosecution without probable cause is a violation of a citizen's fundamental constitutional right. Prosecution of the IPMC without the mandated notice of violation is a violation of Taylor's fundamental due process right.

The District Judge erred in accepting the Report and Recommendation to grant absolute immunity to these prosecutors in their individual capacities. The decision must be reversed.

(a). Municipal Prosecutors should lose absolute immunity for pursuing a case that has a mandated constitutional notice of violation.

Appellees assert that municipal prosecutors do not lose absolute immunity for handling a defect case. However, Appellees overlooked the fact that there is a higher duty placed upon them. It is absurd to think that justice is fair and blind when these municipal prosecutors failed to protect Taylor's constitutional right to due process of law. Appellees cannot hide behind conclusory statements.

Appellees site Imbler v. Patchman for passing the functional test for being entitled to absolute immunity in this case. Their reliance on Imbler is flawed. The prosecutor's acts in Imbler were associated with the judicial phase of the criminal process, there was probable cause for the prosecution, and the actions were within the scope of official duties.

A violation of the IPMC requires Taylor to bring her dwelling unit up to code requirements. Appellees contend that Taylor knew what she was required to do because she was informed to clean up her yard. Nothing in the mandated notice of violation speaks to bringing a yard up to code.

Appellees also contend that: "Prosecutors do not derive their powers and duties from the IPMC." Surely, everyone knows that this legal reasoning is unconstitutional. Violations of the International Property

Maintenance Code are governed by the International Property Maintenance Code, and prosecutors must acquire their powers and duties from the law.

The current case is more than just a defected case. Prosecutors are officers of the court who have a duty to know the law and to protect constitutional rights. They cannot hide behind a superficial cloak of absolute immunity and be oblivious of their duties and responsibilities. Actions of Municipal prosecutors that are outside of the scope of official duties of the IPMC are not entitled to absolute immunity. Actions of Municipal prosecutors that rely on a notice of violation that is unconstitutional are not entitled to absolute immunity. Actions of Municipal prosecutors that do not have probable cause for prosecution are not entitled to absolute immunity.

Additionally, Appellees contend that Taylor ignores the fact that Prosecutor Swanson ended the case by entry of a nolle prosequi. However, Appellees misrepresent the fact that an issue of law takes precedent over issue of fact. Swanson nolle prossed the case for lack of the witness when there was a motion before the court on an issue of law to dismiss the case for lack of a proper notice of violation.

The real question in this case is basic law: Why are municipal prosecutors entitled to absolute immunity for pursuing a case under the IPMC for 1 ½ years to have Taylor clean her yard without the mandated notice of violation for a dwelling unit? The only answer is: the Municipal prosecutors are not entitled to absolute immunity under the facts of this case.

The adoption of the Report and Recommendation by the District Judge to grant absolute immunity in their individual capacities is plain error. The decision must be reversed.

(b) Prosecutor Thye is not entitled to absolute immunity by seeking and obtaining an order to inspect Taylor's yard.

Municipal prosecutor Thye was not acting within the scope of official duties under the IPMC as discussed in the Informal Brief and is incorporated herein by reference.

Obtaining an order to inspect Taylor's yard is definitely not a prosecutorial duty under the IPMC and Thye is not entitled to absolute immunity. This case is based on a violation of the IPMC for Taylor's yard as admitted by the Appellees. A yard is not a house and a house is not a yard. Prosecution for violation of the IPMC pertains to dwelling units and existing structures. Under the IPMC Taylor could not be prosecuted for yard. She must be prosecuted for her house not meeting IPMC standards. Therefore, Thye is not entitled to absolute immunity for fraudulently prosecuting Taylor for her yard. This is comparable to giving fraudulent testimony to secure an indictment. The argument is circular because all of the elements for prosecution are missing.

Hence, the decision of the District Court must be reversed. Thye is entitled only to qualified immunity.

ISSUE 2: <u>Are Municipal Prosecutors for violation of the International Property Maintenance Code ordinance not being entitled to absolute Immunity a Novel issue of law for the 21st Century?</u>

Appellees contend that there is existing law to determine if municipal prosecutors are entitled to absolute immunity under the facts of this case and cite <u>Imbler</u> once again. Their reliance on <u>Imbler</u> is misplaced. Additionally, they contend that this case does not present a novel issue of law for not granting absolute immunity.

Contrary to Appellees argument, Appellant has not found any cases granting absolute immunity to Municipal

prosecutors for violations of the IPMC who did not have the mandated notice of violation; the constitutional violation was not committed by the prosecutor, and it was committed before the case began.

Regardless of the Appellees argument, this is a novel issue of law because of the lack of precedent. The municipal prosecutors are not entitled to absolute immunity. As the facts in this case indicate, the constitutional rights of Taylor, as well as thousands of citizens, will not be protected when municipal prosecutors, not acting within the scope of their official duties for violation of an ordinance, are granted absolute immunity.

The District Court erred in not considering this case as a novel issue of law for not granting absolute immunity to municipal prosecutors. The decision must be reversed.

CONCLUSION

The argument that just appearing in court as a prosecutor entitles these Municipal prosecutors to absolute immunity must not be accepted by this Court. A Municipal prosecutor is an advocate for the City and the laws that it enact. A Municipal prosecutor must be acting within the scope of duties of the IPMC to be entitled to absolute immunity and the burden of proof must never be shifted to a Defendant. The integrity of the judicial system will be undermined if these Municipal prosecutors are granted absolute immunity given the facts of case and the record as a whole.

For the reasons set forth herein and the Informal Brief, this Honorable Court must reverse the decision of the lower.

Respectfully submitted,

June 12, 2008

/s/ Carolyn Yvonne Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
803-309-0487 (cell)

Case: 08-1372 Document: 20 Date Filed: 09/08/2008

08-1372

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Carolyn Yvonne Murphy Taylor, Appellant -Petitioner,

v.

Walter Todd, Esq., in his official capacity as Assistant City Attorney and his individual capacity; Dana M. Thye, Esq., in her official capacity as Assistant City Attorney and her individual capacity: Hunter P. Swanson, Esq. in her official capacity as Assistant City Attorney and her individual capacity,

Defendants – Appellees,

and

City of Columbia; Charles P. Austin, Sr., City Manager, Columbia, S.C.; Donnie Balzeigler, Code Enforcement Officer, Columbia, S.C; Larry McCall, Chief Code Enforcement Officer, Columbia, S.C; all in their official capacity and individual capacity,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. JOSEPH F. ANDERSON, JR., CHIEF DISTRICT JUDGE. (3:O7-cv-00983-JFA-JRM)

PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

Carolyn Yvonne Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
803-309-0487 (cell) or 803-771-6297
Petitioner, *Pro se*

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STATEMENT OF PURPOSE

This case raises questions of exceptional importance about prosecuting violations of International Property Maintenance Code ordinance (IPMC). The 2000 International Property Maintenance Code has a mandated notice of violation. This notice of violation is a guaranteed right by the Fourteenth Amendment to the United States Constitution. An adequate notice of violation is a necessary element of proof the prosecutor needs to prove that a defendant violated the IPMC. The panel's decision contravenes Petitioner's constitutional right to adequate

notice as required by Due Process of law. Though the alleged crime is a misdemeanor under the IPMC, that fact alone does not negate a Petitioner's right to an adequate notice.

The Panel's decision is contrary to the landmark case of Imbler v. Patchman, 424 U.S. 409 (1976), that gave prosecutors absolute immunity from civil rights litigation in the judicial process if and only if they were acting within the scope of their duties. The prosecutors in Imbler did not become advocates until after there was probable cause. In Petitioner's case, the prosecutors were not acting within the scope of their duties for prosecuting a case for violation of the IPMC and never became advocates with probable because the notice of violation was inadequate.

Petitioner was not issued an adequate notice of violation. Petitioner's constitutional right to an adequate notice of violation has been violated. In balancing petitioner's constitutional right to adequate notice against the cloak of absolute immunity granted to prosecutors, the protection of petitioner's constitutional rights must be given greater weight.

The issue of whether a defendant's Due Process constitutional right to adequate notice must be protected when the defendant is subject to criminal prosecution based on an ordinance is a precedent-setting question of exceptional importance. The question of whether municipal prosecutors are entitled to absolute immunity in the judicial phase for proceeding with a criminal prosecution pursuant to an ordinance when the mandates of the ordinance have not been satisfied is also a precedent-setting question of exceptional importance. The panel's decision accordingly warrants reconsideration and reversal by the court en banc.

ARGUMENT

This case readily satisfies the established criteria for rehearing en banc set forth in Fed. R. App. P. 35 and 4th Cir. Rule 35. It concerns questions of exceptional importance about absolute immunity for municipal prosecutors of the IPMC that the panel's decision[4] did not resolve and conflicts with the Petitioner's constitutional right to an adequate notice of violation.

I. THIS IS AN EXCEPTIONAL CASE FOR THE COURT OF APPEALS TO HEAR EN BANC.

The Fourteenth Amendment to the U.S. Constitution provides in part, that no state may "deprive any person of life, liberty, or property without due process of law." This provision has been interpreted as requiring the states to assure that the defendant is receiving "that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941) This fundamental concept of fairness should be dominant in every judicial proceeding.

The prosecutors have a legal duty and inherent duty to defend the Constitution of the United States, and to protect a defendant's constitutional rights. In South Carolina prosecutors must have probable cause to pursue a criminal case.

This case is controlled by the 2000 International Property Maintenance Code ordinance which was adopted by the City Council of Columbia in September 2001. (The expressed intent of the IPMC is to regulate existing buildings and structures. (Doc. 1-2 Exhibits p. 13 § 101.3)The IPMC mandates five (5) specific requirements for

[4] The Court of Appeals' Panel affirmed the District Judge's Order which in turn had adopted the Magistrate Judge's Report and Recommendation to grant absolute immunity to the prosecutors in their individual capacity.

an adequate notice of violation (Doc. 1-2 Exhibits p. 15 §107.2) The IPMC expressly states that the notice of violation is a necessary element of proof in the prosecution of an accused. (Doc. 1-2 Exhibits p. 15 § 106. 3) The IPMC expressly states if Petitioner did not comply with the notice of violation then she is guilty of a misdemeanor, and the violation is a strict liability offense. (Doc. 1-2 Exhibits p. 15 §106.3)

The required notice of violation is always issued by a code enforcement officer (officer) before a charge for violation of the IPMC can be initiated by the officer. (Doc. 1-2 Exhibits p. §104.6) (S.C. Code Ann. § 56-7-80) Subsequently, the prosecutor cannot control the content of the Notice of Violation issued. Nor can the prosecutor initiate a case for a violation the IPMC. However, the prosecutor has a duty to ensure that the Notice of Violation is in proper form before prosecuting such persons. The importance of the Notice of Violation is the same as that of an arrest warrant. Both must be in proper form for subsequent prosecution to be within the law.

Petitioner received a prima facie inadequate notice of violation from the code enforcement officer. The officer also issued a Uniform Ordinance Summons for violating the IPMC. All the content required to be in the notice of violation was not in the notice of violation that was issued to Petitioner. (Doc. 1-2, Exhibits p. 133) Petitioner's Warning Notice of Violation does not imposes criminal liability on her for violating the IPMC. The IPMC defines Strict Liability Offence as: "An offense in which the prosecution in a legal proceeding is not required to prove criminal intent as a part of its case. It is enough to prove that the defendant either did an act which was prohibited, or failed to an act which the defendant was legally required to do." ((Doc. 1-2 Exhibits p. 20.)

Being a strict liability offense, the notice of violation is the law of the case and an essential element of proof

needed for a jury, or judge, to determine innocence or quilt of the accused Petitioner. The IPMC clearly sets forth the requirements of acting within the scope of duties when prosecuting a violation of the IPMC in Section 106.3. (Doc. 1-2 Exhibits p. 15 §106.3).

The burden of proof is on the prosecutors to show that Petitioner did not comply with the notice of violation that was issued by the officer. In order to meet this burden of proof, the prosecutors must have an adequate notice of violation that was issued by the officer. The Warning Notice of Violation received by Petitioner is constitutionally infirm. Therefore, the prosecutors were not acting within their official duties and did not have probable cause. To grant absolute immunity to these municipal prosecutors will not help to protect the judicial process. The prosecutors are only entitled to qualified immunity.

The case law for prosecutors' entitlement to absolute immunity focuses on state level prosecutors who initiate and pursue a criminal charge. There is no case law for prosecutors who can never initiate a charge for violating the IPMC. There is no case law for prosecutors in the judicial process where there is a constitutional right that was violated before the case begins, and that was committed by someone else. There is no case law that examines whether the actions of a municipal prosecutor are within the scope of duties for a strict liability misdemeanor offense.

As discusses above, there are questions of exceptional importance. Fundamental fairness and justice for all is the primary goal of the judicial system. My Petition for a panel rehearing and petition for rehearing en banc must be granted because a miscarriage of justice has occurred.

II. THE COURT OF APPEALS PANEL ERRED IN AFFIRMING THE RATIONALE AND AUTHORITIES CITED IN THE REPORT AND RECOMMENDATION TO GRANT ABSOLUTE IMMUNITY TO THE APPELLEES.

The cases cited in the Report and Recommendation and adopted in the District Judge's Order have no similar facts to Petitioner's facts. The issue of absolute immunity for state prosecutors and municipal prosecutors are different. The former prosecutor must prove mens rea to obtain a conviction. The latter prosecutor must only prove that the accused did not comply with the Notice of Violation.

a. The Court of Appeals Panel erred in affirming Imbler v. Patchman as an authority to grant absolute immunity to prosecutors, in their individual capacities, of the IPMC for a strict liability misdemeanor offense.

The question presented in In Imbler v. Pachtman, 424 U.S. 409 (1976) to the Court was: "whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amendable to suit under 42 U.S.C. 1983 for alleged deprivations of the defendant's constitutional rights."
Under the common law, the rule is that crimes require proof of mens rea except in cases of public nuisance, criminal and blasphemous libel, and criminal contempt of court. The court determined the crime in Imbler was one that requires proof of mens rea under common law and the state prosecutor was entitled to absolute immunity under common law. The Court opined: "We hold only that in initiating a prosecution and presenting the State's case the prosecutor is immune from a civil action suit for damages under 1983.

One of the rationales for absolute immunity for state level prosecutors is that "the function of a prosecutor that most often invites common-law tort action is his decision to initiate a prosecution..." In order to not hamper the initiation of cases, the court reasoned the prosecutor needed to be free from the threat of lawsuits.

In this case the facts are very different to Imbler. They only time that the prosecutor has any involvement with the judicial process is when the defendant requests a jury trial. As discussed above, the prosecutor can never initiate a case for an IPMC violation. Nor can the prosecutor issue a notice of violation.

A municipal prosecutor in the judicial phase of an IPMC case must:

a. be an advocate with probable cause
b. protect constitutional rights of defendants to an adequate notice of violation for the prosecution
c. have the elements of proof necessary to get a conviction
d. be acting within the scope of official duties

These prosecutors have a legal duty and inherent duty to protect a defendant's rights while enforcing the law, regardless of whether that law is an ordinance, statute, or other law. Prosecutors must have probable cause to pursue a criminal case. In this case, the failure of the officer to follow ordinance mandates for the notice of violation before he charged petitioner obviated probable cause.

Since notice of a violation is a necessary element of proof, inadequate notice necessarily deprives the government of probable cause. In the absence of probable cause, the prosecutors had no legally justifiable or legally enforceable reason to prosecute. Therefore, they were not

protected by absolute immunity. The Panel erred. The court should grant the Petition.

B. **The Court of Appeals Panel erred in not accepting the standard in Buckley v. Fitzsimmons which states: "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity.**

The standard used in Buckley v. Fitzsimmons, 509 U.S. 259 (1993) is right on point for this IPMC case regardless of who committed theconstitutional violation. The Court needed only to determine (1) if there was a constitutional right that was guaranteed by the 14th Amendment that was a necessary element of proof for prosecution of the IPMC violation and (2) if that constitutional right had been violated.

The Panel erred by not adopting the standard used in Buckley. The mandated constitutional right to an adequate notice of violation was violated. (Doc. 1-2, Exhibits p. 33) The Petition should be granted.

CONCLUSION

This case requires this Honorable Court to unravel absolute immunity on a functional basis in the judicial phase. The Court must make a distinction between a Municipal prosecutor of the IPMC with an adequate notice of violation being entitled to absolute immunity and a Municipal Prosecutor of the IPMC with an inadequate notice of violation not being entitled to absolute immunity.

The circumstances of absolute immunity for prosecutors of the International Property Maintenance Code have taken a 360 degree turn. Absolute immunity can no longer be based on case law from 1976 and common

law in effect in 1851 when the first civil rights act was enacted by congress.

There is no case law on prosecutors of the IPMC which is a strict liability offense. There is no case law on a prosecutor of the IPMC acting within the scope of his official duties. There is no case law with similar facts to Petitioner's facts. Stare decisis does not apply to prosecutors of the IPMC in the judicial phase who do not have an adequate notice of violation. The 21st century mandates that absolute immunity be reexamined from the functional approach of a prosecutor in the judicial phase of an IPMC case.

Imbler v. Patchman decided that prosecutors are entitled to absolute immunity in the judicial phase only after they become advocates who have probable cause. Imbler also requires the prosecutor's actions to be within the scope of official duties. In the instant case, the IPMC requires prosecutors to have an adequate notice of violation, which is equivalent to probable cause. Therefore, the prosecutors were not acting within the scope of their official duties.

The standard for constitutional wrongs that are committed before a case begins has been set forth in Buckley v. Fitzsimmon for a prosecutor, who committed the constitutional violation, being entitled only to qualified immunity for administrative or investigative behavior This standard "if a constitutional wrong is complete before the case begins, the prosecutor is entitled to only qualified immunity" must now be applied to a prosecutor in the judicial phase of an IPMC case.

The time has come to protect the Constitutional right of Petitioner, and others, that is clearly established in the IPMC before the case begins and was violated. The time has come to determine if a prosecutor of the IPMC is an advocate without the mandated notice of violation as

required by the 14th Amendment to the United States for this strict liability misdemeanor offense.

The time has come to consider cases where the prosecutor can never initiate the charge for violation of the IPMC and can never issue the notice of violation. The time has come to ensure that prosecutors help protect Petitioner's, as well as others, constitutional rights that they have no control over except when an alleged violator of the IPMC request a jury.

The time has come to ensure that prosecutors of strict liability offenses are advocates with an adequate notice of violation for the IPMC. The time has come for this Honorable Court to recommit yourselves to fundamental fairness and "justice for all" all the time.

Petitioner humbly requests this Honorable Court grants her Petition for Panel Rehearing and Petition for Rehearing En Banc because of the miscarriage of justice that was done. God bless you and your families. God bless America.

Respectively submitted,

September 8, 2008 /s/Carolyn Yvonne Murphy Taylor

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EXHIBIT #9

CITY OF COLUMBIA) TRANSCRIPT OF RECORD
)
) JANUARY 13, 2006
VS,) JURY TRIALS
) JUDGE J. STEEDLEY BOGAN
CAROLYN M. TAYLOR) ACA DANA M. THYE
)

1. **MRS. THYE:** YOUR HONOR, THE NEXT
2. MATTER IS ON PAGE 21, LINE
3. 1, CAROLYN TAYLOR, MRS. TAYLOR? COME ON
4. UP. YOUR HONOR, THIS IS A
5. HOUSING CASE. MS. TAYLOR IS CHARGED
6. WITH A VIOLATION OF THE
7. INTERNATIONAL PROPERTY MAINTENANCE
8. CODE. WALT TODD HAS BEEN
9. HANDLING IT FOR A COUPLE OF TERMS FOR
10. ME AND LEFT ME A NOTE
11. INDICATING – AND MR. BALZEIGLER IS HERE
12. FROM THE CITY OF COLUMBIA.
13. WHAT WE'D LIKE TO DO IS GET AN ORDER
14. FROM THE COURT ALLOWING US TO
15. LOOK INTO THE BACKYARD OF MS. TAYLOR
16. TO CONFIRM THAT THE – THE
17. INITIAL CHARGE WAS TO REMOVE SOME OF
18. THE DEBRIS AND SOME THINGS FROM THE
19. FRONT YARD, IF THAT'S CORRECT. IT'S SORT
20. OF SOME THINGS THAT WERE
21. COVERED UP THAT SHE WAS TOLD TO
22. REMOVE FROM THE PROPERTY AND WHAT
23. APPEARS TO HAVE HAPPENED IS THEY'VE
24. GONE BEHIND A FENCE NOW AND MR.
25. BALZEIGLER IS NOT ALLOWED TO LOOK OVER
26. THE FENCE. MS. TAYLOR

DOESN'T WANT HIM TO LOOK OVER THE FENCE.
THE COURT: IS MS. TAYLOR REPRESENTED BY MR. MOSLEY?
MRS. THYE: SHE IS NOT. MR. MOSLEY HAS INDICATED HE DOES
NOT REPRESENT HER ON THE CHARGE.
THE COURT: OKAY.
MRS. THYE: AND I BELIEVE IT'S BEEN THAT WAY FOR A COUPLE
OF TERMS NOW THAT HE HASN'T REPRESENTED HER.

THE COURT: ALL RIGHT. MS. TAYLOR. DO YOU HAVE ANY
OBJECTION TO THEM LOOKING IN YOUR BACKYARD?
MS. TAYLOR: YES I DO, YOUR HONOR.
THE COURT: ALL RIGHT WHAT ARE YOUR OBJECTIONS?
MS. TAYLOR: OKAY. I'M HERE UNDER THE JURISDICTION OF THE
COURT UNDER THE SUMMONS THAT WAS DATED MARCH 11, 2005. AND I
HAVE NOT RELINGUISHED MY RIGHT TO A JURY TRIAL. AND I HAVE BEEN
COMING EVERY MONTH SINCE MAY EXCEPT FOR IN DECEMBER. OKAY? ON
WHAT THE PROSECUTOR IS BASING THIS MOTION I'M NOT QUITE SURE BECAUSE
THE ONLY JURISDICTION THAT THE COURT HAS AT THIS TIME IS BY WAY OF THIS
SUMMONS, WHICH SAYS VIOLATION OF THE INTERNATIONAL MAINTENANCE
CODE. AND ANYTHING OTHER THAN THAT WILL DEPRIVE ME OF MY RIGHT TO A
JURY TRIAL.
MRS. THYE: AND WE ARE NOT SEEKING TO DO THAT, YOUR
HONOR. WE INTEND TO GIVE HER A JURY TRIAL. IT'S JUST I THINK IT'S
IMPORTANT FOR US TO KNOW WHETHER OR NOT IF THE ITEMS THAT SHE WAS
TOLD TO REMOVE FROM THE PROPERTY HAVE MERELY JUST BEEN MOVED TO
SOME OTHER LOCATION ON THE PROPERTY HIDDEN FROM OUR VIEW, THEN IT
DOESN'T SOLVE OUR PROBLEM. AND YOU CAN SEE SHE HAS NOT LET US HAVE
ACCESS TO THE BACKYARD SO WE DON'T KNOW IF THAT IS IN FACT THE CASE.

ALL WE ARE LOOKING TO DO IS LOOK IN TO THE BACKYARD TO SEE IF THE
ITEMS ARE STILL THERE.
MRS. TAYLOR: THE PROSECUTOR IS CHANGING THE ISSUES IN
THIS CASE. THIS IN THIS CASE IS WHETHER I'M GUILTY OR NOT GUILTY OF VIOLAT-
ING THE INTERNATIONAL MAINTENANCE CODE. AND THAT'S AN ISSUE OF FACT

FOR THE JURY
THE COURT: ALL RIGHT, YOU"LL GET YOUR JURY TRIAL, MA'AM.
RIGHT NOE WE'RE –
MS. TAYLOR: I UNDERSTAND WHAT YOU ARE SAYING BUT I DON'T
UNDERSTAND WHAT THE PROSECUTOR IS SAYING. COULD YOU EXPLAIN THAT
TO ME A LITTLE BETTER THEN? I DON'T KNOW HOW IF I'M IN HERE UNDER THE
JURISDICTION OF THE COURT BY THE SUMMONS AND I'VE BEEN TRYING TO GET
TO A JURY TRIAL TO DETERMINE WHY I AM GUILTY OR NOT GUILTY.
THE COURT: IN EFFECT THEY ARE ASKING FOR DISCOVERY IN
THIS CASE. WHAT AUTHORITY DO YOU HAVE FOR DOING THAT IN THIS –
MRS. THYE: IT'S NOT REALLY DISCOVERY.
MRS. TAYLOR: IT'S NOT DISVOVERY.
MRS. THYE: I THINK QUITE FRANKLY I'M NOT SURE WE EVEN
NEED A COURT ORDER TO BE ABLE TO LOOK IN HER BACKYARD BUT – YOU
KNOW, THE INSPECTORS HAVE THE ABILITY TO GO ON PROPERTY IF THEY HAVE
A REASONABLE BELIEF THAT THERE IS A PROPERTY MAINTENANCE CODE
VIOLATION. THEY CAN USUALLY LOOK OVER A FENCE AND DO THAT AND THEY
HAVE DONE THAT IN THE PAST. IN THIS CASE I THINK YOU KNOW, SHE'S INDICATED AN UNWILLINGNESS FOR US TO DO THAT AND SO WE ARE I GUESSS
ASKING THE COURT FOR SPECIFIC PERMISSION THAT I'M NOT SURE WE DON'T
HAVE ALREADY BY VIRTUE OF THE PROPERTY MAINTENANCE CODE. BUT MR.

BALZEIGLER CAN TALK ABOUT THE ATTEMPTS HE'S GONE TO AT LEAST LOOK OVER (INAUDIBLE).

THE COURT: ALL RIGHT. TELL ME ABOUT IT.

MR. BALZEIGLER: WELL, AS SHE STATED -

1. MR. BALZEIGLER IS DULY SWORN BY THE COURT)
2. **MR. BALZEIGLER:** AS SHE STATED, ON MARCH 11TH I USSUED
3. HER THE UNIFORM SUMMONS FOR VIOLATION OF THE PROPERTY
4. MAINTENANCE CODE, INTERNATIONAL PROPERTY MAINTENANCE CODE.
5. **THE COURT:** AND THAT WAS BECAUSE THERE WERE SOME -
6. **MR. BALZEIGLER:** BECAUSE THERE WAS A LOT OF WHAT WE
7. CONSIDER DEBRIS AND EXTRANEOUS ITEMS IN THE YARD. WE HAD GOTTEN
8. COMPLAINTS FROM VARIOUS PEOPLE IN THE NEIGHBORHOOD ABOUT THE
9. CONDITION OF THE YARD AND AT THAT POINT I TOOK PHOTOGRAPHS OF THE
10. YARD AND I TOLD MS. TAYLOR THAT, YOU KNOW, THE YARD WOULD HAVE TO
11. BE BROUGHT UP TO SANITARY CONDITIONS. AND SHE DID EFFECT A LOT OF THE
12. CLEANUP; HOWEVER, THERE IS – SHE HAS A SHED WHICH IS SURROUNDED BY A
13. FENCE WHICH YOU CAN'T SEE OVER AND BEHIND THIS FENCE WE HAVE REASON
14. TO BELIEVE THAT A LOT OF THE –
15. **THE COURT:** WHAT REASON DO YOU HAVE TO BELIEVE THERE'S
16. ANYTHING BEHIND THE FENCE?
17. **MR. BALZEIGLER:** WELL, BECAUSE THAT'S WHERE A LOT OF THIS
18. DEBRIS HAS BEEN MOVED BEHIND THIS FENCE AND BASICALLY IF THIS CREATES
19. UNSANITARY CONDITIONS BEHIND THIS FENCE, THEN THE SUMMONS HAS NOT
20. BEEN ABATED.
21. **MRS. TAYLOR:** HE SAYS HE --

THE COURT: WELL --
MRS. TAYLOR: MAY I, YOUR HONOR?
THE COURT: YES, MA'AM
MR. TAYLOR: I'M SORRY.

1. **THE COURT:** GO AHEAD.
2. **MS. TAYLOR:** LET ME HEAR WHAT YOU HAVE TO SAY FIRST.
3. **THE COURT: GO AHEAD.**
4. **MS. TAYLOR:** OKAY. HE'S TALKING NOW IN TERMS OF
5. ABATEMENT AND I HAVE NOT BEEN SUMMONS TO COURT FOR FAILURE TO
6. ABATE. I HAVE BEEN SUMMONS TO COURT FOR A VIOLATION OF. ANY ATTEMPT TO
7. WORK WITH THE CITY AND TRY TO ABATE I FORMALLY WITHDRAW AND I
8. WOULD LIKE TO HAVE MY RIGHT TO A JURY TRIAL AS TO WHETHER OR NOT I AM
9. GUILTY OF VIOLATING THE INTERNATIONAL PROPERTY MAINTENANCE CODE AS CHARGED.
10. **THE COURT:** YES, MA'AM. THAT'S NOT REALLY THE ISSUE HERE
11. TODAY. IT'S WHETHER I GIVE THEM PERMISSION TO LOOK IN YOUR BACKYARD.
12. **MS. TAYLOR:** THAT'S THE ISSUE BECAUSE THIS WHAT
13. GIVES YOU JURISDICTION.
14. **THE COURT:** IS THERE SOME AUTHORITY YOU CAN POINT ME TO
15. THAT ADDRESSES THAT IN THE INTERNATIONAL PROPERTYN CODE OR THE CITY.
16. CODE THAT GIVES THE CITY AUTHORITY TO LOOK IN THE BACKYARDS?
17. **MR. BALZEIGLER:** OKAY. I HAVE A HERE FROM THE
18. INTERNATIONAL PROPERTY MAINTENANCE CODE AS FAR AS THE DUTIES OF THE
19. HOUSING CODE OFFICIALS AND YOU SEE THAT UNDER SECTION 104.4 RIGHT OF
20. ENTRY.

THE COURT: DO YOU HAVE THE BOOK UP HERE?

MRS. THYE I DON'T KNOW IF THERE'S ONE UP THERE OR NOT. IS

THERE A PROPERTY MAINTENANCE CODE BOOK UP THERE? THERE MIGHT BE

ONE IN THE OTHER COURTROOMS BUT I DON'T KNOW THAT WE HAVE ONE HERE.

MS. TAYLOR: ARE WE UNDER THE 2000 CODE?

THE COURT: I KNOW THERE'S A LITTLE PAMPHLET AROUND HERE
SOMEWHERE THAT HAS THAT IN THERE. LET ME SEE THE SECTION.
MRS. THYE THIS IS A PAGE FROM THE INTERNATIONAL PROPERTY
MAINTENANCE CODE SECTION 104.
THE COURT: ALL RIGHT.
MRS. THYE: SECTION 104.4, RIGHT OF ENTRY, YOUR HONOR.
THE COURT: ALL RIGHT, MA'AM, THE SECTION THEY ARE
POINTING ME TO SAYS THAT A CODE OFFICIAL – THAT'S THIS GENTLEMAN –
MS. TAYLOR: UH-HUH.
THE COURT: IS AUTHORIZED TO ENTER THE STRUCTURE OR
PREMISES AT REASONABLE TIMES TO INSPECT SUBJECT TO CONSTITUTIONAL
RESTRICTIONS ON UNREASONABLE SEARCHES AND SEIZURES. IF ENTRY IS
REFUSED OR NOT OBTAINED, THE CODE OFFICIAL IS AUTHORIZED TO PURSUE
RECOURSE AS PROVIDED BY LAW. SO THAT'S WHERE WE ARE AT THIS POINT.
MS. TAYLOR: NO, SIR, I BEG TO DIFFER. OBJECTION
THE COURT: YOU'LL LET HIM?
MS. TAYLOR HUH?
THE COURT: YOU'LL LET HIM IN?
MRS. TAYLOR: NO, BECAUSE WE ARE BEYOND THAT POINT. WE
ARE AT THE POINT OF A CRIMINAL VIOLATION. THEY HAVE GONE THROUGH
THOSE PROCEDURES. OKAY?
MRS. THYE: WE BELIEVE THE VIOLATION CONTINUES.

THE COURT: YES. MA'AM, I'M GOING TO GO AHEAD – I'M GOING
TO –
MS. TAYLOR: MAY I?
THE COURT: GO AHEAD.
MS. TAYLOR: MAY I, PLEASE. OKAY. JUST MAY I PLEASE, JUST
GIVE ME MY TIME HERE. VIOLATION PENALTIES. IF YOU WOULD TURN TO PAGE
THREE, DO YOU HAVE THREE?
THE COURT: I DO NOT HAVE THAT.
MS. TAYLOR: OKAY. (INAUDIBLE)
THE COURT: ALL RIGHT.
MS. TAYLOR: OKAY. UNDER THE VIOLATIONS. NOTICE OF
VIOLATION, PROSECUTION OF VIOLATION. ANY PERSON FAILING TO COMPLY
WITH THE NOTICE OF VIOLATION OR ORDER SERVED IN ACCORDANCE WITH THIS
SHALL BE DEEMED GUILTY OF A MISDEMEANOR. IF THE NOTICE OF VIOLATION
IS NOT COMPLIED WITH, THE CODE OFFICIAL SHALL INSTITUTE AN APPROPRIATE
PROCEEDING AT LAW AND THIS IS WHERE WE ARE. OR IN EQUITY TO RESTRAIN,
CORRECT OR ABATE SUCH VIOLATION OR TI REQUIRE REMOVAL OF, OKAY.
VIOLATION PENALTIES. ANY PERSONS WHO SHALL VIOLATE A PROVISION OF
THIS CODE OR FAIL TO COMPLY THEREWITH OR WITH ANY REQUIREMENTS
THEREOF SHALL BE PROSECUTED WITHIN THE LIMITS PROVIDED BY STATE AND
LOCAL LAWS. EACH DAY A VIOLATION CONTINES AFTER THE NOTICE HAS
BEEN SERVED AND SHALL BE DEEMED A SEPARATE OFFENSE. ABATEMENT OF

20. VIOLATION, POSITION OF PENALTIES HEREIN DESCRIBED (INAUDIBLE) NO
21. DECISION, DAH, DAH, DAH. OKAY. WE ARE BEYOND THAT STAGE, YOUR HONOR.
22. WE ARE AT THE STAGE OF I HAVE BEEN ISSUED A SUMMONS TO GIVE THIS
23. COURT JURISDICTION OVER WHETHER OR NOT MY YARD IS IN
24. VIOLATION OF THE INTERNATIONAL MAINTENANCE CODE AND THERE IS NO
25. NEED TO COME BACK INTO MY YARD (INAUDIBLE)

1. **THE COURT:** ALL RIGHT. MA'AM, MY RULING
2. IS GOING TO BE I'M
3. GOING TO GRANT THEIR MOTION TO GIVE THE
4. CITY PERMISSION TO LOOK IN A
5. PEACEFUL MANNER, LOOK AT A REASONABLE
6. TIME IN ACCORDANCE WITH
7. SECTION 104.4 TO LOOK IN YOUR BACKYARD
8. TO SEE IF YOU ARE IN COMPLIANCE
9. WITH THE LAW.
10. **MRS. THYE:** THANK YOU, YOUR HONOR.
11. **THE COURT:** ALL RIGHT. SO THAT'S GOING TO
12. BE MY RULING,
13. MA'AM
14. **MS. TAYLOR:** SO I'M BEING DENIED MY RIGHT
15. TO A JURY TRIAL?
16. **THE COURT:** NO, YOU'LL BE GIVEN A JURY
17. TRIAL.
18. **MRS. THYE:** THE CASE WILL BE CONTINUED
19. FROM TODAY AND
20. WE'LL ACCOMPLISH THAT BEFORE THE NEXT
21. TERM OF CORT, WHICH IS THE
22. WEEK OF FEBRUARY 6TH .
23. **THE COURT:** I WOULD ASK – THIS CASE DOES
24. SEEM TO HAVE
25. PENDING FOR A LONG TIME. I'D ASK THAT IT
26. COME TO A TRIAL.
27. **MRS. THYE:** AND WE INTEND TO. ONCE WE
28. HAVE THIS, THIS IS
29. REALLY ALL WE NEED.
30. **THE COURT:** HERE IS YOUR COPY BACK,
31. MA'AM..
32. **MS. TAYLOR**: THANK YOU
33. **THE COURT:** AND HERE'S YOURS._GOOD
34. LUCK TO YOU, MS.
35. TAYLOR.
36. **MS. TAYLOR:** THANK YOU.
37. (ADJOURNED)

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EXHIBIT #11

STATE OF SOUTH CAROLINA)	IN THE MUNICIPAL) COURT OF THE CITY
COUNTY OF RICHLAND)	OF COLUMBIA)
City of Columbia)	Summons No.: 7580) Unlawful Acts (1st Offense)) (Violation of Property
-vs-)	Maintenance Code))
Carolyn M. Taylor)	**ORDER**)
Defendant.)	

This matter came before the Court for a hearing on January 13, 2006. The City was represented by Dana Thye, Esq. and the Defendant appeared Pro Se. The Defendant is charged with one count of violating the 2003 International Property Maintenance Code as adopted by the City of Columbia. Pursuant to Section 104.4 of the Code there is provided for the right of entry onto the property in order to inspect for violations. The Defendant has resisted the City's attempts to enter the rear portions of the premises and it has become necessary to secure an Order allowing the same.

Upon the Motion of the City of Columbia it is hereby ordered that the Defendant allow the City of Columbia, through its agents or employees, to inspect the premises located at 2295 Byrnes Dr., 29204 this shall include all exterior portions of the property, including, but not limited to, the area behind the fence in the backyard and any appurtenances thereto.

IT IS SO ORDERED.

s/ J. Steedley Bogan
Municipal Court Judge

Columbia, South Carolina
February 10, 2006

3:07-cv-00983-JFA-JRM Date Filed 04/12/2007
Entry Number 1-2 Page 115 of 139

EXHIBIT #13

STATE OF SOUTH CAROLINA)	IN THE MUNICIPAL
)	COURT OF THE
)	CITY OF COLUMBIA
COUNTY OF RICHLAND)	
)	Summons No.: 7580
City of Columbia)	Unlawful Acts (1st Offense)
)	(Violation of Property
-vs-)	Maintenance Code)
)	
Carolyn M. Taylor)	
)	**REQUEST TO**
)	**CHARGE JURY**
Defendant.)	
)	

To This Honorable Court:

The Defendant hereby request the Court to give the following charge to the jury in this case:

Ladies and Gentlemen of the jury, you have listened to the proceedings and evidence in this case and it is now my duty to instruct you as to the law in this case. The laws of the State of South Carolina do not permit me to comment on the facts in this case. You, as jurors, are the sole judges of the facts in the case; however, it is my duty to give you the law and you must be accept and apply the law as I give it to you and be guided thereby in your consideration and in your deliberation upon the evidence in the case.

You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence. You may

believe or disbelieve all, or any part, of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief, according to the weight you assign to the testimony of each witness.

The law does not require any defendant to prove her innocence of a crime. On the Contrary, The law requires the State to establish a defendant's guilt by legal evidence and beyond a reasonable doubt. The law presumes the defendant to be innocent of the charge made against her in the Uniform Ordinance Summons until her guilt has been proven beyond a reasonable doubt. The burden of overcoming this presumption of innocence is placed upon the State and rests upon the State throughout the trial until the state has satisfied you evidence of the defendant's guilt beyond reasonable doubt.

The defendant is charged by the City of Columbia under the summons which I read to you at the beginning of this trial, with having violated Ordinance Section No. 2000-027 of the Municipal Code of Laws of the City Of Columbia. This is the offense of unlawful Acts under the International Property Maintenance Code.

The Defendant is required to be served a notice of violation for violation of the International Property Maintenance Code. (page 3, Section 106..2 of the 2000 International Property Maintenance Code). Any person failing to comply with a notice of violation or order served in accordance with Section 107 shall be deemed guilty of a misdemeanor, and the violation shall be deemed a strict liability offense. If you find that the Defendant did not comply with a notice of violation that was properly served on her, then you must find her guilty. Otherwise you must find her innocent, (page 3, Section 106.3 of the 2000 International Property Maintenance Code).

I pray that this Honorable Court grant this request

Respectfully Submitted,

March 10, 2006

/s/ Carolyn Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
(803) 771-6297
Defendant ***Pro Se***

EXHIBIT #14

CITY OF COLUMBIA
SOUTH CAROLINA
OFFICE OF THE CITY ATTORNEY / POST OFFICE BOX 667 / COLUMBIA, S.C. 29202 / 737-4242 / FAX (803) 727-4250

May 1, 2006

VIA HAND-DELIVERY
Hon. Marian O. Hanna
Columbia Municipal Court
811 Washington Street
Columbia, South Carolina 29202

RE: City of Columbia v. Carolyn M. Taylor
Summons No.:7580 – Unlawful Acts (Violation of IPMC)

Dear Judge Hanna:

Please accept my sincerest apologies for not attending to this matter sooner. You instructed me on March 10, 2006, to prepare an Order in this case and I just realized I had neglected to do so. Enclosed please find a proposed Order in the above matter. You may remember that this was with regard to a Property Maintenance Code violation and the required notice the City was to give the Defendant.

If this Order meets with your approval, please sign same and I will send a copy to the Defendant. By copy of this letter I am sending a copy of this proposed Order to the Defendant for her records as you instructed.

Sincerely,
s/Dana M. Thye
Assistant City Attorney

/dt Enclosure as stated
cc: Carolyn M. Taylor (*via regular mail*)

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Entry Number 1-2 Page 118 of 139

EXHIBIT #15

STATE OF SOUTH CAROLINA	)	IN THE MUNICIPAL COURT OF THE CITY OF COLUMBIA
COUNTY OF RICHLAND	)	
City of Columbia	)	Summons No.: 7580 Unlawful Acts (1st Offense) (Violation of Property Maintenance Code)
-vs-	)	
Carolyn M. Taylor	)	**ORDER**
Defendant.	)	

This matter came before the Court for a hearing on March 10, 2006. The City was represented by Dana Thye, Esq. and the Defendant appeared Pro Se. The Defendant is charged with one count of violating the 2003 International Property Maintenance Code ("IPMC") as adopted by Ordinance No.; 2005-080 of the City of Columbia. Defendant made a Motion to Dismiss the charge for failure of the City to comply with the notice provisions of the IPMC found in Section 107 – Notices and Orders.

Defendant contends that the City did not give her adequate notice as provided for in Section 107.1 that provides in pertinent part for notice to be given to the owner or persons responsible whenever the code official determines that there has been a violation of the IPMC. That notice is to comply with Section 107.2 in its form. Specifically, Section 107.2 states that notices shall: be in

writing; include a description of the real estate sufficient for identification; include a description of the violation and why notice is being issued; include a correction order allowing reasonable time for repairs; and, inform the property owner of their right to appeal.

It appears from the record and Defendant's own admissions that she received notice compliant with the requirements of Section 107.2. Defendant admitted that she received in writing, a Warning Notice of Violation dated December 9, 2004, which told her to abate the violations by December 23, 2004. That Warning contained the address of the premises, and a statement that "Lots and premises are required to be properly cut and cleared of all overgrowth, undergrowth, trash, debris, vines, and rank vegetation. This includes hedge rows, ditches, fences, and around trees. Such accumulation of growth or debris has been found to be a health detriment by the City of Columbia." Those specific violations are violations of Section 302.1 (Exterior Property Areas) of the IPMC. It was further written that defendant "remove all misc. items, materials, debris and objects from premise grounds." At Defendant's request, she was provided with a copy of the IPMC Section 302.1 relevant to her Warning Notice of Violation. When the time elapsed and the violation was not abated, a Summons was issued. That Summons also contained the address of the premises, 2295 Byrnes Drive, as well as reference to the nature charge, Violation of International property Maintenance Code, Section 106 – Violations.

Defendant does not, indeed cannot, argue that she did not know what was expected of her to abate the violation. Defendant merely argues that the notice was deficient. This Court does not agree. There is no question that Defendant knew of the specific violations alleged and what she need to do to abate them. The Warning Notice of Violation took care of that along with the Summons. Because Defendant received notice of the violations as

provided for in Section 107.2, her Motion to Dismiss is denied.

IT IS SO ORDERED.

_____
Hon. Marian O. Hana
Municipal Court Judge

Columbia, South Carolina
April ___, 2006

EXHIBIT 16

CAROLYN MURPHY TAYLOR
2295 Byrnes Drive
Columbia, South Carolina 29209
803-771-6297

HAND

DELIVERED

May 3, 2006
RECEIVED

MAY 03 2006
MUNICIPAL
COURT

Honorable Marian Hanna
Columbia Municipal Court
811 Washington Street
Columbia, South Carolina 29202

Re: **City of Columbia v. Carolyn M. Taylor**
Summons No.: 7580 – Unlawful Acts (Violation of (IPMC)

Dear Judge Hanna:

I received the proposed Order denying my Motion to Dismiss the charge in the above referenced case on yesterday from Assistant City Attorney, Dana M. Thye. There are several inaccuracies in the proposed Order. The inaccurate statements are as follows:

1. "The Defendant is charged with one count of violating the 2003 International Property Maintenance Code ('IPMC") as adopted by Ordinance No.: 2005-080 of the City of Columbia." (page 1, lines 2-4)

   Explanation: I was charged with violating the 2000 International Property Maintenance Code.

2. "Specifically, Section 107.2 states that notices shall be in writing; include a description of the real estate sufficient for identification; include a description of the violation and why notice is being issued; include a correction order allowing reasonable time for repairs; and inform the property owner of heir right to appeal." (page 1 lines, 10-13)

Explanation: Wording of Section 107.2 (4) of the 2000 IPMC has been omitted. It states: "Include a correction order allowing a reasonable time **to make repairs and improvements required to bring the dwelling unit or structure into compliance with the provisions of this code.**" (Emphasis added)

Page 2: Letter to Judge Hanna
May 3, 2006

3. "It appears from the record and Defendant's own admissions that she received a notice compliant with the requirements of Section 107.2" (page 1 lines 14-15)

   The defendant has never admitted she received a notice that complies with the requirements of Section 107.2 of the IPMC. Non-compliance with the 2000 Code is the basis of the Motion to Dismiss as stated in paragraph 1 of the proposed Order.

4. "Those specific violations are violations of Section 302.1 (Exterior Property Areas) of the IPMC." (page 2, lines 6-7)

   Explanation: The aforementioned statements in the Order, which the specific violations are misrepresented as being in Section 302.1 of the IPMC, are violations

prohibited under the Municipal Code of the City of Columbia, SC, Sections 8-31, 8-32, 8-34, 8-35, 8-301, 8-303, and 8-305. Section 302.1 of the 2000 IPMC states:

All exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior which such occupant occupies and control in a clean and sanitary condition.

5. "At the Defendant's request, she was provided with a copy of IPMC Section 302.1 relevant to her Warning Notice of Violation."
   Explanation: On March 11, 2005after being charged with violating the 2000 IPMC, I asked Inspector Balzeigler what was the IPMC. He gave me an explanation at that time and sent me a copy of the 2003 IPMC section via United States Postal Service Postmarked March 16, 2005. Clearly, the copy of IPMC section 302.1 was not relevant to Warning Notice of Violation dated December 9, 2004.

6. "Defendant does not, indeed cannot, argue that she did not know what was expected of her to abate the violation. Defendant merely argues that the notice was deficient."

   Explanation: I did not have notice of violating the 2000 IPMC prior to being issued the Summons on March 11, 2005. Therefore it was impossible for me to know what I was violating and how to abate the violation.

Page 3: Letter to Judge Hanna
May 3, 3006

Your Honor, if this Order is signed as written, it will be a travesty of justice because the Order contains too many

errors of law and facts. I am requesting that you make appropriate changes of the inaccurate statements in the proposed Order.

Thank you for your cooperation and consideration in this matter.

Sincerely,

/s/ Carolyn Murphy Taylor
Carolyn Murphy Taylor

Cc: Dana M. Thye, Assistant City Attorney (via U.S. Postal Service)

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EXHIBIT #17

CITY OF COLUMBIA
SOUTH CAROLINA
OFFICE OF THE CITY ATTORNEY / POST OFFICE BOX 667 / COLUMBIA, S.C. 29202 / 737-4242 / FAX (803) 727-4250

May 8, 2006

Hon. Marian O. Hanna
Columbia Municipal Court
811 Washington Street
Columbia, South Carolina 29202

RE: City of Columbia v. Carolyn M. Taylor
Summons No.:7580 – Unlawful Acts (Violation of IPMC)

Dear Judge Hanna:

I have received Ms. Taylor's criticism of the proposed Order and agree with only one point. She is correct that she was cited while the 2000 International Property Maintenance Code was in effect, not the 2003 version. I have made that correction and attached the proposed Order to this letter. It is worth noting that relevant sections did not change between versions.

I do not agree with the other points in her letter, also attached for your reference. She wants to add language from sections not applicable to the charge, and argue points decided by her motion.

Sincerely,

/s/ Dana M. Thye
Assistant City Attorney

/dt
Enclosure as stated
cc: Carolyn M. Taylor (*via regular mail*)

3:07-cv-00983-JFA-JRM Date Filed 04/12/2007
Entry Number 1-2 Page 135 of 139

EXHIBIT #21

CITY OF COLUMBIA) TRANSCRIPT OF RECORD
)
) NOVEMBER 30, 2006
VS,) JURY TRIALS
) SUMMONS NO.: 7580
)
CAROLYN M. TAYLOR)
) JUDGE J. STEEDLEY BOGAN
_____)

MS. SWANSON: The next matter on the docket is just
Something that I'd like to put on the recorded located on page17,
Line 5, Carolyn Taylor
THE COURT: All right
MS. SWANSON: Your honor, Ms. Taylor was originally
Charged with some violations of a City Ordinance, Donnie Balzeigler
was the representative from the city who was the Code Enforcement
Officer who is behind the case. He is no longer with the City and we
are Nol Prossing this charge. So this charge will be dismissed and
this particular charge that occurred on March 11, 2005 will not be
prosecuted. However, if Ms. Taylor is in violation in the in the future for
the same types of things, another code enforcement could
issue a new citation for different offenses
THE COURT: You understand that, Ms. Taylor?

MS. TAYLOR: Yes, Sir. I object to the nol, process, your Honor, I would – in fact, you do have a motion on my dismissal on the case because in this case there was a due process issue. Did you receive this, Your Honor?

MS. SWANSON: Your Honor, I do not believe that was Relevant since we are choosing not to prosecute it

THE COURT: Ms. Taylor, I think that the City has a right to dismiss the charge if they want to. You can't stop them from dismissing the charge. And let me – I think what the City wants to tell you it sounds like, and it's certainly the law as I understand it, is that every day that this same condition goes uncorrected is a new violation

MS. TAYLOR: I understand.

THE COURT: So if a new officer comes out there and makes a charge against you that won't be affected by the nol pros. They can go forward with another charge. So you'll get a chance then to raise any defenses that you have.

MS. TAYLOR: Your Honor, I've been to court eleven times in this case. I've also paid the fine that was given back in 2005 and a nol process in this case – it drops the charge but by --

THE COURT: It means you get your money back.

MS. TAYLOR: And I really move the court for a dismissal with prejudice

THE COURT: I'm not going to do that, Ma'am. I'm going to let them just withdraw it. If they are not going to bring this back, It's the custom of the City not to bring back nol prossed charges so...

MS. SWANSON: In this charge in particular Mr. Balzeigler is no longer with City. We don't have a prosecuting witness so we wouldn't be able to bring this charge back

THE COURT: They are not going to bring this particular charge back again, okay. So good luck to you, Ma'am.

(ADJOURNED)

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EXHIBIT #20

STATE OF SOUTH CAROLINA	)	**IN THE MUNICIPAL**
	)	COURT OF THE
COUNTY OF RICHLAND	)	CITY OF COLUMBIA
	)	
City of Columbia	)	**Summons No.: 7580**
-vs-	)	**Unlawful Acts (1st Offence)**
Carolyn M. Taylor,	)	**(Violation of Property**
	)	**Maintenance Code)**
Defendant	)	
	)	**Notice of Motion and**
	)	**Motion to Dismiss**
	)	**RECEIVED**
	)	NOV 28 2006
		MUNICIPAL COURT

TO THE HONORABLE JUDGE J. STEEDLEY BOGAN:

The defendant, Carolyn M. Taylor, (Taylor) hereby moves this court for an Order to dismiss the above captioned case on the following grounds:

1. On March 10, 2006 Judge Marian Hanna heard defendant's Motion to Dismiss. Prosecutor Dana M.Thye submitted a revised Proposed Order May 8, 2006. As of today, the defendant has not received a written, signed and filed Order from Judge Hanna on the motion. Subsequently, Taylor does not have an effective Order because Judge Hanna has not officially ruled on the motion.

2. On March 11, 2005, the defendant was charged with violating the 2000 International Property

Maintenance Code (IPMC). A copy of the Uniform Ordinance Summons is attached as Exhibit 1 and is incorporated herein.

3. IPMC Section 106.2 Notice of violation states: The code official shall serve a notice of violation or order in accordance with Section 107. Inspector Balzeigler did not issued a notice of violation to the defendant as mandated in Section 106.2 that complies with Section 107 of The 2000 International Property Maintenance Code prior to issuing the Summons No. 7580 on March 11, 2005 to the defendant for violation of said Code.

4. IPMC Section 107.1 Notice to owner or to person or persons responsible states: Whenever the code official determines that there has been a violation of this code or has grounds to believe that a violation has occurred, notice shall be given to the owner or the person or persons responsible therefore in the manner prescribed in Sections 107.2 and 107.3. Notice for condemnation procedures shall comply with section 108.3.

5. It is mandatory that defendant receives a notice of violation that complies with IPMC Section 107.2. Section 107.2 Form states:

> Such notice prescribed in Section 107.1 **shall be in accordance with all** of the following:
>
> 1. Be in writing.
> 2. Include a description of the real estate sufficient for identification.
> 3. Include a statement of the violation and why the notice is being issued.
> 4. Include a correction order allowing a reasonable time to make repairs and improvements required to bring the

dwelling unit or structure into compliance with provisions of this code.

5. Inform the property owner of the right to appeal.

6. Defendant received a Warning Notice of Violation issued by Inspector Balzeigler dated December 9, 2004. Violations of the IPMC are not cited in this notice as required. It does not include numbers 3, 4, and 5 of IPMC Section 107.1 as stated above. However, the notice clearly cites violations of the City's Municipal Code, Sections 8-31, 8-32, 8-33, 8-34, 8-35, 8-301, 8-302, 8-303, 8-304, and 8-305. A copy of the Warning Notice of Violation is attached as Exhibit 2 and is incorporated herein.

7. The Fourteenth Amendment of the United Constitution and the South Carolina Constitution guarantees due process of the law and equal protection of the law. The defendant's due process rights and equal protection rights have been violated as outlined above because she did not receive a Notice of Violation as mandated in the IPMC Section 107.1

8. Furthermore, the intent of the IPMC is stated in Section 101.3: "This code shall be construed to secure its expressed intent, which is to ensure public health, safety and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises. Existing structures and premises that do not comply with these provisions shall be altered or repaired to provide a minimum level of health and safety as required herein."

The undersigned hereby certifies that consultation with the Prosecutor for the purpose of resolving subject matter within the Motion would serve no useful purpose.

Wherefore the Defendant prays that this Honorable Court will dismiss the case in the above captioned matter.

Respectfully Submitted,

November 28, 2006

/s/ Carolyn Murphy Taylor
Carolyn Murphy Taylor
2295 Byrnes Drive
Columbia, South Carolina 29204
(803) 771-6297
Defendant ***Pro Se***

EXHIBIT #1

CITY OF COLUMBIA
UNIFORM ORDINANCE SUMMONS
NO: 7580

CITY OF COLUMBIA **VERSUS**

LAST NAME	FIRST NAME	MIDDLE NAME
Taylor	Carolyn	M.

ADDRESS		
2295 BYNES DR	Columbia SC	29204

DOB	RACE	SEX	HT	WT	HAIR	EYES	DL#
11-27-1946	B	F	5'9"	230		Brn	001583972

YOU ARE SUMMONED TO APPEAR BEFORE THE MUNICIPAL JUDGE FOR THE CITY OF COLUMBIA AT 811 WASHINGTON STREET, COLUMBIA, SOUTH CAROLINA ON

Date of Trial		Time of Trial	
4-11-05	AT	8 am	FOR A TRIAL CONCERNING

VIOLATION OF CITY OF COLUMBIA ORDINANCE:

Ordinance Section No		Date Issued		Bond Amount
2000-027		3-11-05		$ 153.75
Description of Ordinance				Charge Code
Unlawful Acts	International Property Maintenance			PMCA
Date of Violation	Time of Violation A.M.		Place of Violation	
3-11-05	10 00 AM P.M.		2295 Byrnes Dr	
Name of Issuing Officer	Employee No./Dept.		Title	
Donnie Balzergler	09021 / Development Services		Code Enforcement Officer	

Please see reverse side for instructions on how to post the bond and important regarding your rights. The issuing officer cannot accept the bond. Bond must be received prior to the date and time you are required to appear.

NOTICE

FAILURE TO APPEAR BEFORE THE COURT WITHOUT HAVING POSTED BOND OR WITHOUT HAVING BEEN GRANTED A CONTINUANCE BY THE COURT IS A MISDEMEANOR PUNISHABLE BY A FINE UP TO $200 OR IMPRISONMENT FOR UP TO 30 DAYS.

WHITE COPY- COURT YELLOW COPY VIOLATOR PINK COPY, ISSUING OFFICER

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EXHIBIT #2[5]

P*

WARNING
NOTICE OF VIOLATION

The Municipal Code of the City of Columbia, SC, Sections 8-31, 8-32, 8-33, 8-34, 8-35, 8-301, 8-302, 8-303, 8-304 and 8-305, prohibits the following accumulations:

VIOLATION

Lots and premises are required to be properly cut and cleared of all overgrowth, undergrowth, trash, debris, vines, weeds, and rank vegetation. This includes hedge rows, ditches, fences, and around trees. Such accumulations of growth or debris have been found to be a health detriment by the City of Columbia.

FAILURE TO COMPLY WITH NOTICE

If the person to whom the notice is directed, fails to comply with the City Ordinance(s) within (10) days after such notice is served, accumulations may then be removed by a duly authorized agent of the City, and the cost of doing so shall become a lien upon the property affected and shall be collected in the same manner as municipal taxes are collected.

According to the property ownership records, you are the

---

[5] Petitioner discovered that the District Court inadvertently did not scan Exhibit #2. However, Exhibit #2 is located in Exhibit #20 at page 130 of 139.

owner of the property located at: 3019 & nx to 3019 Schoolhouse Rd*

NAME*: Carolyn Taylor Murphy

ADDRESS*: 2295 Byrnes Dr Cola SC 29204

T.M.S. NUMBER*: 11513-4-2,3

NOTICE ISSUED*: 12-9-04

NOTICE EXSPIRES*: 12-23-04

REMARKS*: Remove All Misc Items, materials, Debris, And Objects From Premise Grounds

IF NO ACTION HAS BEEN TAKEN WITHIN TEN (10) DAYS, YOU MAY BE SUBJECT TO THE PENALTIES PRESCRIBED FOR VILOLATIONS OF THIS ORDINANCE

DATE*: 12-9-04

ISSUING OFFICER: /s/D. Balzeigler

CITY INSPECTIONS DEPARTMENT (803) 545-3430

NOTE: FAILURE TO ABATE COULD RESULT IN A SUMMONS BEING ISSUED FOR FAILURE TO COMPLY.

MINIMUM FINE: $465.OO
ADDITIONAL COURT & ABATEMENT COSTS MAY APPLY.
MUNICIPAL CODE SEC. 8-38

*** indicates handwritten**